

THE CONCEPT OF THE CHILDREN'S  
COURT IN TASMANIA

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#### IV.

##### EXTRACT

The object of this thesis is to study the operation of welfare-orientated legislation in the juvenile delinquency and child neglect jurisdiction. Most of the statutes are in similar terms, so the study has been conducted with reference to the Child Welfare Act 1960 (Tas.). However, the concepts, as distinct from details of procedure, will often apply more widely and will be appropriate to other jurisdictions having similar legislation.

Generally, the approach has been to examine the actual operation of the statute, from the inception of the legal process to the completion of any order that may be made by the Children's Court. This includes not only the judicial role of the Court, but also the execution of the order by an executive agency.

Essentially, the child welfare legislation aims to remove children from the processes of the ordinary criminal law. A child is to be treated as misguided and in need of assistance. The Children's Court must look to his future welfare as the primary consideration in sentencing. Conceptually it is similar to the parens patriae doctrine of the ancient Chancery jurisdiction over children, but with the important distinction that the modern Children's Court is a creature of statute and has only the power conferred by statute. If the Court is to fulfill the aim of this concept it must dispense personalized justice. In each case the order must meet the individual circumstances of the child defendant.

For the achievement of this goal, the statute provides for simple discharge without the recording of a conviction, the imposition of supervision orders, which may be conditional and finally for declaration of the child as a ward of the State. If the Court is uncertain as to the course it should adopt and requires further information, the child may be remanded in care for

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up to three months for further assessment. This thesis examines the operation of each of these orders in regard to both delinquent and neglected children. It follows that if the order is to be peculiar to the needs of each defendant the Court must have enough background information about the defendant to make the appropriate assessment. Social background investigations and reports are therefore an integral part of the juvenile justice system. The nature of these reports is considered, together with their legal status. Of special interest in this context is whether they should be revealed to the parties concerned. This problem is also examined.

The thesis then proceeds to a study of the manner in which the order, once made, is put into effect by the executive agency, namely, the Department of Social Welfare. This includes both residential and non-residential care and the legal status and rights of the child and parents during the operation of the programme. It may be thought that the personality and rights of both child and parents are subrogated to the unfettered control and discretion of a public service department. This aspect of the system has also been studied.

Since the report of the Kilbrandon Committee in 1964, the idea of the juvenile panel has received extensive consideration and has actually been introduced in South Australia. This system is examined and compared with the traditional judicial system. Another innovation is the family court concept. This has also been studied and compared with the system created by the Child Welfare Act.

Chapter 7 sets out the conclusions of the study, that whilst the Children's Court system is not free from defects, it is the most preferable of the alternatives yet available,

## CHAPTER 1

### INTRODUCTION

#### GENERAL PRINCIPLES

The institution of the Children's Court is a product of the success of the movement directed towards the removal of children from the processes of the ordinary criminal law. Essentially, the philosophical position of the reform movement was that there should be no distinction between the delinquent and the neglected child. A child who committed an offence should not be treated in the same way as an adult criminal offender. Instead he should be regarded and treated as a youngster in need of help, as an understanding parent would a difficult child. In no sense was the child an outcast from society. On the contrary, he was to be held the child of society, to be given the help and care that society can give. The needs of the child are care, guidance and understanding. The theory is to protect the child from the social conditions that led to the wrong doing.

Such a philosophy resembles in its most important respects the parens patriae doctrine of the ancient Chancery jurisdiction over children. That approach looks to welfare and best interest as the paramount consideration. It is because of that that the strict criminal procedure in the adult jurisdiction was not as necessary for juveniles. Whereas the adult criminal was the enemy of society, to be tried, and punished if guilty, the child delinquent was not. As the adult offender was to be punished, he must be able to defend himself. For this purpose there were certain presumptions and procedures that were said to be for his benefit: the presumption of innocence and the burden of proof. But if he were guilty, he was punished. In the case of the child, the major premise was different. The child was the child of society, his interests and those of society were not in conflict.

There was no need for the strict adherence to criminal procedure that was followed in the adult jurisdiction. The role of the Children's Court would be to ascertain what should be done in the best interests of the juvenile offender. It would be the duty of the Court to stand in the place of a good parent and take such action as was necessary for his benefit. The issues for the Court would not be criminal responsibility, but welfare and rehabilitation. It would not seek to make an offender atone for the past, it would look to his best interests, to the future, not to the past.

To achieve these objectives, the procedure of the children's jurisdiction must be 'personalized'. The stigma of the regular Law Courts is to be avoided. It is the good of each individual that the Court should ascertain and develop. A rigid stereotyped approach was thus inimical to the essential premise of the reform movement. The precise criminal act which brought the offender under notice was of no special significance. That was regarded only as a symptom of an overall problem for which help was indicated. The child should be viewed as a whole; his personality, his home and environment, indeed his every aspect. In the light of all these matters it would be decided what should be done to secure his best interests in the future. <sup>1</sup>

This philosophy has been translated into legislation in many jurisdictions. All States of Australia, in addition to the United States and Great Britain, have special Children's Courts. A different system, but based upon the same principle, obtains in the Scaninavian countries and in Scotland. There the legislatures have opted for the Juvenile Panel system, which will be considered in Chapter 5. The object of this thesis is to examine how this philosophy is put into effect with particular reference to the Tasmanian Child Welfare Act. Whilst the study has been confined to the Tasmanian system, much of it will apply more widely, as the child welfare legislation of the various States is in similar terms, with major emphasis on future welfare and rehabilitation.

CHILDREN'S COURT PRACTICE

The process of the Court must be peculiar to each individual defendant. What may be conducive to the welfare of one child in particular circumstances may not be conducive to the welfare of another in different circumstances. Simply, the Court must recognise the individuality of each defendant. As a concept this may be simple to state, but practical realization is more difficult. Above all else, the Court must be fair, and that fairness must be recognised in the community. Where circumstances require different decisions for the same offence, an even greater degree of public understanding becomes necessary. It is of little help to say to one child that he is being sent to an institution for his own benefit, when another charged with a similar offence, but in different conditions, is simply released under supervision. For the Court to be fully effective to carry out this aim it is submitted that three conditions must be satisfied; namely,

- (1) The Bench and staff must be identified with the overall philosophy of the Court and the notion of personalised justice.
- (2) Facilities must be sufficient to ensure that: -
  - (i) The decisions of the Court are based upon proper knowledge of the needs of the child.
  - (ii) If he is in need of attention, he should be treated by people and through facilities adequate for the purpose:
  - and
  - (iii) The community is properly protected.
- (3) With the above objectives in mind, procedures must be developed that will: -
  - (i) Provide an individualised process; and
  - (ii) Protect the legal rights of both the offender and his parents.

Maintaining this balance is probably one of the biggest challenges facing the Children's Court, and other specialised Courts of domestic relations. On the one hand there is the old common law theory that parental rights are inalienable. On the other, the notion that children are the State's responsibility, and parents are merely delegated to carry out the State's role. It follows that the State, through the Courts, may derogate from parental rights as much as necessary to secure the interests of children.

For this latter proposition there is judicial authority in the United States. To save him from becoming a criminal the State may bring a child before the Court without any process at all.<sup>2</sup> But of course the problem is to know where the best interest really lies. At least one eminent writer has stated that the emotional shock associated with the removal of a child from home may deprive him of the benefit of a placement that may appear to be a better one.<sup>3</sup> The same enigma emerged from the findings of the United States President's Task Force on Crime.<sup>4</sup> It was reported that whilst the juvenile Court system was badly disorganised and overloaded, almost to the point of collapse, the biggest problem facing the court was lack of knowledge (i.e. what in fact should be done for the welfare of a juvenile offender?) What is 'the best interest' of a juvenile? And how is it to be achieved? It was the lack of the knowledge necessary to answer fundamental questions that caused the insoluble problems in the American system. Essentially, the task facing the Court, and those specialists who support it, is to determine how delinquent children can be helped. Indeed, in spite of the facilities in Tasmania, there has been an increase in delinquency that cannot be disregarded.<sup>5</sup> The early philosophy was that a good environment and a good education was the answer to the delinquency problem. No modern writer would state the problem in such simplistic terms.<sup>6</sup> Considered in the light of modern knowledge the formula is question begging - what is a good environment? However, the influence of the

early philosophy should not be underestimated. To that single notion the Children's Court jurisdiction owes its existence. In that spirit it will continue, although the way in which the philosophy finds its practical expression may well change. The Court must not become a dispenser of automatic justice, ill-suited to the particular needs of individual children.

Conceptually, although the children's jurisdiction is well established, it is exceedingly complex. Its concept entails a full appreciation of the functioning of family relationships. It seems that all anti-social behaviour is not the result of perversity or ignorance. Superimposed upon this is the possibility that experts may disagree about the handling of a specific case, and, consequentially, the right of people to live their own lives as they wish and as fully as possible. By making juvenile justice more personal and welfare-orientated the way is also open for the abrogation of the personality of the recipient. The system must not be allowed to become one where the child simply has imposed on him the culture of the particular conception of a social worker or psychiatrist. A system of values should not be superimposed simply because some expert is of the opinion that another set is better. That is a matter of personal judgment that should not be permitted in the execution of a programme for the benefit of a child. There is no doubt that the powers conferred by the child welfare legislation are devastatingly wide, mostly in the form of an administrative discretion to a welfare agency which is not responsible to the Court. In comparison with this the powers of the Star Chamber were a trifle.

In contra distinction to some of the United States jurisdictions, the ordinary rules of legal procedure apply to conduct of the Children's Court in Tasmania.<sup>7</sup> But it does not follow that the strict procedure as in an adult Court applies also. As a matter of practice, most children plead guilty. Accordingly, the major issue for the Court is the disposition of the case:

i.e. what should be done in the best interests of the defendant? Only in the small proportion of cases where there is a plea of not guilty do the ordinary criminal procedures apply to the determination of that issue. After the finding, if the child is guilty, the jurisdiction becomes paternal. Here it is important not to overlook the principle that parents should be responsible for the care of their children, and equally that children should not unjustly be deprived of their liberty and of their natural bonds with their parents. This is a tenet of modern psychology, as well as of commonsense. Parental rights are not beyond the control of the State, since they must in all cases be exercised within the law. Certain minimum standards are required. Education is compulsory, and so is compliance with the public health laws. There is a wide area however, where the decisions of parents are their own prerogative. Nevertheless, minimum standards must be maintained. Here they are not then the law may intervene. The circumstances where such intervention is possible are set out in s. 31 of the Child Welfare Act 1960 (Tas.). In effect, it defines as a neglected child a child who: -

- (1) is living with a person unfit to have care and control of him, and is in need of care and protection so that he shall not fall into bad associations;
- (2) is beyond the control of his parents or guardians;
- (3) associated or lives with reputed thieves, drunkards or prostitutes or with a person who has no apparent lawful means of support;
- (4) who is found wandering without any place of abode, without means of subsistence, or is found begging, or loitering for the purpose of begging;
- (5) is found in a brothel or opium den, or who being a female solicits, importunes or accosts any person for immoral purposes;



- (6) who is a habitual truant from school;
- (7) who dwells in the same house as a person suffering from venereal disease or tuberculosis in conditions that are dangerous to his health.

A child found in any of these conditions is neglected. The Court may declare him to be a ward of the State, or place him under a supervision order. It will be noted that the terms of the section are wide and while the concepts are capable of expression in simple terms, the application of them may change from time to time. Conceptions of morality change in the course of time. In the same way, the interpretation of what constitutes neglect, in respect at least of moral considerations, will also change. An additional factor is that notions of neglect, in both physical terms and bad moral associations, may not only vary from time to time, but also from one person to another. This is the paradox of the jurisdiction. Personal value judgments should have no place in applying these criteria, but it is difficult to see how they can be avoided. In these cases, the Court must judge public opinion as best it can and decide accordingly. This must be a judicial function not to be surrendered to such people as social workers. The concept is fixed, but its application will vary. Here, rights of the parents may have to be limited. Intervention comes when the standard of care provided by them falls short of that which is required by society.

In a similar way, the child may have his freedom limited when he is beyond control. Parents have the obligation to provide care and protection, the child has the obligation to respond. He, too, must comply with the minimum requirements of society. What makes the jurisdiction of the Children's Court distinctive is that, in either case, it acts to ensure that the best interest of the child will be secured in the future. No punishment is meted out for bad conduct. What is sought to be achieved is that in the future the child

will be a properly adjusted member of the community. The scope of the Court's role is wide. As will be seen later, the effect of declaration as a ward of the State is to vest guardianship in the Director of Social Welfare. Even an order that he be under supervision, the juvenile equivalent of probation for an adult, means that there are important limitations on the role of the parents. Such wide powers are necessary for the achievement of the goals set for the children's jurisdiction. However, it is submitted that certain principles should be observed and accorded legal force:

(1) The conditions under which the State is empowered to intervene should be clearly defined. If the welfare authorities desire to intervene they should be required to show that conditions exist rendering intervention necessary in the interests of the child or society or both. These conditions should be defined as clearly as possible by law. Interference on the somewhat general notion that the child is in need of care and protection, or because of disagreement with the parents, is nebulous and fraught with danger. Nor should intervention be permissible where, solely in the opinion of the welfare agencies, the child could be better cared for as a ward of the State. In all cases some harm to the child or the community should be shown. Under the definition of neglect in s. 31 of the Child Welfare Act the conditions are laid down, but even so the scope for value judgments is appreciable.

(2) All concerned should be entitled to know the basis on which the State seeks to intervene and how it is proposed to secure the care of the child in the future. It follows that the defendant should be given the opportunity to rebut or comment upon the case in favour of intervention. Such seems fundamental to our conceptions of justice, but certain difficulties seem inherent. Evidence of the neglect must be given in Court in the child's presence and of his parents. They have every right to present a defence and cross-examine. But, on the dispositional level, problems may arise if

confidential reports and expert opinions are made known without limit to the persons about whom they were written. On the one hand, strict justice may require disclosure, on the other, revelation of reports and opinions may destroy the last vestige of hope and confidence in an already shaken family. This problem is more fully discussed in Chapter 2. Here the point is simply that the evidence said to prove the neglect, the legal grounds for the intervention, should be made clearly known to the parties affected.

(3) Since the liberty of the child and the rights of the parents are affected, the Court should have some control over the child's future. This is not, at present, recognised under Tasmanian legislation. Once a child has been declared a ward of the State his future is determined by the Director of Social Welfare, who becomes his legal guardian. He remains a ward till the age of eighteen years, unless by order of the Minister he is discharged earlier.

Where these rights are given legal recognition, the ends of the jurisdiction, it is submitted, will not be frustrated. On the contrary, by giving the public confidence that the child defendant does not become a mere pawn in a process that is not fully comprehended, the system should be strengthened. The fact that the Court must look to the legal rights of the defendant, that it must ensure that the basis for intervention has been made out and that the hearing is conducted judicially, should in no way detract from the special aims of the jurisdiction. It is where the Court ceases to act like a Court and falls entirely into the hands of the supporting welfare and psychiatric ancillary staff that it may expect to lose the confidence of the public. Ancillary staff are non-judicial, they are not answerable to the defendant in any way at all and only in a restricted way to the Court, in that they must provide certain information. For the essential parts of the rehabilitation process the Court has no status at all. This is a tendency that should be kept in

check. It is submitted that even children have rights that should be given proper protection and legislative recognition. The Court should not become functus officio as soon as it has made an order, leaving it to an agency to carry out the programme. Of course legislation alone cannot create an effective system. Much will depend upon the spirit and the attitudes of the persons concerned in the administration of the scheme.

#### THE COURT AND EXECUTIVE AGENCIES

It is not suggested however, that the Court should superintend every aspect of the rehabilitation process. This is bound to be specialised, requiring a high degree of expert skill. Detailed planning, day to day care and the routine administration of the welfare programme would be well left to the specialised agency providing the service. In some States of America the institution of a Family Court has developed. The role of this Court is to provide not only the legal jurisdiction over family matters, such as adoption, divorce and delinquency, but also provides facilities for the care and counselling of children who are the victims of such situations. The administration of the welfare programme here is under the control of the Court and is, in fact, part of the Court's structure. In Tasmania, the Court and the executive bodies who carry out the orders of the Court are distinct and separate bodies. Unless the Family Court body is properly created with the appropriate staff, there are good reasons for the separation of the judicial and executive aspects of the juvenile jurisdiction. There is little merit in the duplication of services and those who desire the assistance of the welfare authorities should not have to go before a Court to obtain it.

In practical terms, there seems little difficulty in isolating those matters which concern the Court and those which do not. Where the case is

one of neglect or delinquency there are several distinct steps. These are as follows: -

(a) Investigation and Filing of the Complaint

Here the factual basis for the intervention must be established. It must be shown that the defendant is guilty of an offence, or in a neglect case, that the state of neglect is such that it comes within the legal definition. The investigation on this level is the responsibility of the executive agency charged with the enforcement of the law, which will usually be the police. In some cases, allegations of neglect may be made by welfare agencies. Whoever makes the investigation and files the complaint, is clearly not acting in a judicial capacity and thus the Court will have no place in it. The role of the Court is simply judicial.

(b) The Hearing

After the complaint has been investigated and filed, the Court then becomes seized of the matter and the case proceeds to hearing. The Court must first determine the factual basis of the complaint: whether the child is neglected or is guilty of the offence with which he has been charged. Clearly that is judicial.

(c) Background Social Investigation

For the process of the Court to be personalised, the Magistrate must be fully acquainted with all the relevant circumstances of the offender. This will extend beyond the mere facts necessary to prove what is alleged in the complaint. Emotional and environmental factors often have a bearing upon behaviour. It may be because of some psychological disturbance that the offence occurred. An order committing a child to care may be appropriate in some cases and not in others. If the order of the Court is to fit the personal needs of each individual offender then the Court must be fully aware of his personal and social background. This is the reason for the background social investigation.

A report embodying these matters is prepared by the Social Welfare Department and submitted to the Court after it has found affirmatively on the issue of fact. Only at this stage does the social background report become admissible. Before it is submitted to the Magistrate, there must have been an affirmative judicial finding on the facts alleged in the complaint. When such a finding has been made, the Court must then decide what course of action to pursue. In this latter decision alone does the social investigation play a part.

Most children plead guilty and so, usually, the task of the Court will be to decide what course it should follow in the best interests of the offender. In practice the social report is of crucial importance and often decisive. The bulk of the time spent on any one case will be directed to deciding what should be done in the promotion of welfare. In this respect the work of the executive agency is closely allied with the judicial role of the Court. The reporting officer may submit recommendations for the consideration of the Court, but the decision is a matter exclusively for the Court. The point being that, given the overall objective of the Children's Court, the Magistrate is able to arrive at a better decision in the light of full background particulars and of details of the professional and ancillary facilities available for education and rehabilitation. As an aid to this consideration, the opinion of those who will be responsible for the administration of the programme is invaluable. The provision of the necessary background information is closely related to the judicial function and the Court may sometimes require additional information of a specific nature. The responsibility for the provision of the reports is that of the Director of the Social Welfare Department.<sup>8</sup>

(d) The decision

As a result of the considerations set out in (c) above, the Court will reach a decision. That decision will affect the rights of both the parents and child and is, of course, a judicial matter for the Court alone.

(c) The execution of the programme

The actual execution of the programme is the sole responsibility of the Welfare Department. It may be that a supervision order is imposed. In that case, the actual method of supervision is the responsibility of the Department. The Court still has some influence, though. First, it may impose conditions as part of the order: for example, that the child shall not frequent certain specified places, or associate with co-offenders. Failure to observe these conditions constitutes a breach of the order, for which the child may be taken back before the Court. A recognizance may also be required, and it too may be made conditional. These powers will be considered in more detail subsequently.<sup>9</sup> While these orders remain effective, the Court retains control over any major policy decisions. However, once the child becomes a ward, the Court loses all control. He then becomes subject to the control and discretion of the Director.<sup>10</sup> Major decisions may then be made without the assent of either the Court or the parents.

Even though the scope of the Court's function is limited subsequent to the decision, the respective roles by and large of the Court and the Department are clearly delineated. The Court has been vested with the judicial power to make the decision to intervene in the first place, whilst it is the responsibility of the Department actually to intervene and carry the programme into effect.

Finally, the role of the police should not be overlooked. For under the present legislation, primary responsibility for the initiation of prosecutions is that of the police. No longer must the approval of the Director be obtained before a complaint is laid in respect of a child. This confers a wide power on the police. Undoubtedly forbearance is extended to minors, which for the present purpose means that the police will not be as willing to prosecute children as they would an adult. In other words, they may use discretion in

deciding whether to prosecute. This is a wide discretion indeed, for upon its exercise will depend the possibility of a child's being brought to the attention of the welfare authorities.

Similar discretion has been placed at the disposal of police in the United States, and in many cases it has come to be exercised in accordance with a settled and elaborate procedure. The child may be warned that if he does or fails to do some specified act in future he will be prosecuted, or he may simply be warned that next time he offends he will be prosecuted. Another procedure is for the police to refrain from launching a prosecution if the child undertakes some form of youth counselling. In some jurisdictions, informal supervision by the police has been imposed as a condition of non-prosecution. Failure to respond to the condition or refusal to submit to the informal police supervision renders the juvenile liable to prosecution. This has come to be known as "informal adjustment". Some of the schemes set up by the police are quite sophisticated. Special staff have been appointed, although not trained as social welfare workers, they are supposed to have an appropriate background of skill and experience. Vocational recreational centres have been erected and these youths are often required to attend during specified hours.<sup>11</sup> The point being that such discretions come to be exercised in accordance with rules and settled procedures.

Schemes for informal adjustment have come in for close study.<sup>12</sup> Some may say the schemes are not within the scope of police duty, who are neither equipped nor trained for it, and it usurps time that should be spent on proper police business, namely the prevention and detection of crime. On the other hand, it could be argued that the schemes have become so elaborate that they involve a limit on the person subject to them, with the threat of prosecution always being held out and therefore constitute a contravention of legal rights. They amount to a restriction of personal liberty without a judicial determination.



No pretence is made that the schemes are expert rehabilitation moves, they are simply supervised leisure. On the whole, however, the schemes seem to be valuable.

At present no such scheme exists in Tasmania, but there is a procedure for determining whether a child should be prosecuted. A first offender is not prosecuted as a matter of routine. Instead he, together with his parents, is asked to attend a police station where a warning is issued by a senior officer. He may be prosecuted for a subsequent offence, or he may, if circumstances warrant, be prosecuted for a first offence. As the police have responsibility for initiating prosecutions it is a matter which they must decide. So it is too in the case of a neglected or uncontrollable child. (It is usually the police who first come in contact with neglect in its early stages, or children who are said to be beyond the control of their parents.) In view of developments in the United States, the importance of the power conferred upon the police is obvious.

These are the aims of the juvenile jurisdiction. In this thesis it is proposed to examine how this philosophy is put into operation in Tasmania, and to examine the actual operation of the Child Welfare Act 1960 (Tas.).

#### THE CHILD WELFARE ACT 1960 (TAS.)

It is interesting to note that the dichotomy of jurisdiction as to indictable and summary offences is maintained in the Children's Court legislation. Children's Courts have only limited jurisdiction over the former. In view of the principles governing the approach to youthful and child offenders, it may, perhaps, be that there is no social purpose to be achieved by keeping these crimes within the exclusive jurisdiction of the Superior Courts. Admittedly, this is not the only consideration. Community standards of the degrees of seriousness of crimes are still important.<sup>13</sup> In some cases there is an option

to be tried before a Children's Court or by a judge and jury.

THE CONSTITUTION AND POWER OF THE CHILDREN'S COURT

The policy motivating the legislature in enacting this statute is given force by s. 4, which is worth quoting in full: -

"The powers and authorities conferred on any Court or any person by this Act shall be exercised so as to secure that, insofar as it is practicable and expedient, each child suspected of having committed, charged with or found guilty of an offence shall be treated, not as a criminal, but as a child who is, or may have been, misdirected or misguided, and that the care, custody and discipline of each ward of the State shall approximate as nearly as may be to that which should be given to it by its parents".

With this objective in mind, Children's Courts are created by Part 111 of the Act. Section 13 provides that Courts of summary jurisdiction sitting for the purpose of hearing charges against children shall be Children's Courts. The Governor may appoint for them one or more justices to be Special Magistrates (s. 13 (3)), and may appoint the places at which the Courts may be held (s. 13 (2)). The Court shall consist of the Special Magistrate for that place, and if no Magistrate has been appointed, then it shall consist of a Stipendiary Magistrate, or two justices having jurisdiction where the Court is held. (s. 13 (4)). Notwithstanding anything in s. 13 (4), section 13 (5) provides that if where a special Magistrate has been appointed and is not present when required, then the Court may consist of a Stipendiary Magistrate, or two or more Justices having jurisdiction at that place. As to the physical environment of the Court, s. 13 (8) requires that it shall not be held in the same room as that in which another Court of summary jurisdiction is being held at the same time.

In practice, the Courts are usually constituted by a stipendiary Magistrate sitting alone, but in many country areas and smaller towns, lay Justices of the Peace frequently sit. The provision as to the constitution of the Courts is interesting, not because no special Magistrates, special, that is, in the sense they have qualifications and experience in juvenile delinquency, have been appointed, but because it is clearly envisaged by the Act that such persons may be appointed. It is open under the statute for the appointment to the Bench of Magistrates who have special understanding of social and psychological problems which have a bearing on the juvenile jurisdiction. That is to not say that purely legal factors are of no importance, but it is to say that they are only one of many factors to be weighed and finally incorporated in the decision. The personal circumstances of the child are made the dominant concern by s. 4.

Subject to the Child Welfare Act a Children's Court has, in addition to the powers granted by that Act, all the jurisdiction, powers and authorities possessed by stipendiary Magistrates, Courts of Petty Sessions or Justices (s. 14 (1)). A Children's Court may therefore try and determine all summary offences, together with those where the defendant has an option to be tried before a Judge and jury or in the Children's Court and who elects to be dealt with by the latter. No charge against a child shall be heard by a Court other than a Children's Court<sup>14</sup> except in the case of a child of at least fifteen years who is jointly charged with a person at least seventeen,<sup>15</sup> or where a person of at least seventeen is charged with aiding, abetting, causing, procuring, allowing or permitting the offence with which the child is charged, provided that the child is at least fifteen<sup>16</sup>. This means that a Children's Court has jurisdiction in respect of all summary offences committed by children, and, at the option of the defendant, some jurisdiction over indictable offences. Under the Justices Act 1960 (Tasmania)<sup>17</sup> stealing and certain other offences

analogous to stealing under the Criminal Code where the value of the property does not exceed \$20.00 are deemed to be summary offences. All accused persons have an option to be tried before the Supreme Court or a Court of Petty Sessions or the Children's Court in respect of other specified crimes. In these cases the accused shall be asked whether he wishes to be tried summarily or upon indictment.<sup>18</sup> The offences are those concerned with the escape and rescue of persons lawfully in custody, false statutory declarations and statements, stealing and related offences where the value of the property exceeds \$20.00 but does not exceed \$400.00, breaking into a building other than a dwelling house, forging and uttering cheques of not greater value than \$400.00. These are powers conferred upon all Courts of Petty Sessions, but the power of the Children's Court has been extended by the Child Welfare Act.<sup>19</sup>

Where a child who is younger than fourteen is charged with an indictable offence, other than murder, attempted murder, or wounding with intent to do grievous bodily harm, the charge shall be dealt with by a Children's Court as if it were a summary offence. In the case where the offender has attained the age of fourteen and is charged with an indictable offence other than murder, attempted murder, manslaughter, rape, wounding with intent to do grievous bodily harm or robbery with violence, he, his parent or guardian have the option of trial by the Children's Court or before the Supreme Court. If he elects to be tried in the Supreme Court then the Children's Court justice shall proceed as on committal proceedings. The result is that a Children's Court has jurisdiction, where the child has not reached fourteen, over all offences summary and indictable, except murder, attempted murder, manslaughter and wounding with intent to do grievous bodily harm. At the option of the child or his parents or guardian, the Court has jurisdiction, where he has reached fourteen years of age, over all offences both summary and indictable except murder, attempted murder, rape, wounding with intent to do grievous bodily harm or robbery with

violence. This is quite an extension of jurisdiction beyond that conferred upon the ordinary Courts of Petty Sessions.

By s. 13 of the Child Welfare Act, the Children's Courts are constituted Courts of law. It follows, therefore, that they function according to the ordinary rules of criminal procedure. Rules of evidence apply as they do in adult criminal cases, the parties have the right to legal representation and the offence must be proved according to the standards and procedures applicable in other criminal cases.<sup>20</sup> There seems to be no reason why the child accused should not be subject to cross-examination in the same way as in a Court of Petty Sessions, where he chooses to give evidence. The law as to evidence and procedure applies as fully in the Children's Courts as in any other Court.

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CHAPTER 1 - NOTES

1. Platt: The Child Savers: (1969) Ch. 1.  
 Handler: The Juvenile Court and the Adversary System (1965)  
 Wisconsin Law Rev. 7.
2. Commonwealth v. Fisher 62 Alt. 199, 200 (1905).
3. Bowlby: Maternal Care and Mental Health (1951) p. 179
4. Task Force Report Juvenile Delinquency and Youth Crime (1967)  
 p. 8.
5. Annual Report of the Social Welfare Department (Tasmania) 1968.
6. Bowlby: Child Care and the Growth of Love (1965)  
 p 196 - 7, 228 - 230.  
 Tappan: Crime Justice and Correction (1960) Ch. 3.  
 U.S. President's Task Force Report Juvenile Delinquency and  
 Youth Crime: Ch. 3.
7. For the position in the U.S. see Handler loc cit.
8. Child Welfare Act 1960 (Tas.) s. 15 (2).
9. Ch. 3.
10. Child Welfare Act 1960 (Tas.) s. 46.
11. Handler loc cit.
12. Lemert: Social Action and Legal Change (1970) Ch. 3.
13. R. v. Mather and Rogers 18/1962.  
Gover v. Roffe 38/1966.  
Riss v. R. 52/1966.  
Canning v. Startup 92/1966.
14. Child Welfare Act 1960 (Tas.) s. 14 (2).
15. Child Welfare Act 1960 (Tas.) s. 14 (3)
16. Child Welfare Act 1960 (Tas.) s. 14 (4)

17. Justices Act 1963 (Tas.) s.9.
18. Justices Act 1963 (Tas.) s. 9.
19. Child Welfare Act 1960 (Tas.) s. 27.
20. Justices Act 1959 (Tas.) s. 30.

CHAPTER 2.ORDERS THAT MAY BE MADE BY A CHILDREN'S COURT

A Children's Court may, following a plea or finding of guilt simply order a discharge. If some action of a more positive kind is necessary, it may make a supervision order. The defendant may be placed in the care of the State following declaration as a ward, or, if he is old enough, he may be sent to prison. Fines are possible, but are usually confined to adolescents in employment.

Into these general categories all Children's Court orders fall. Under the Child Welfare Act 1960 (Tasmania) it is provided that children found guilty of offences shall not be treated as criminals. This is made clear by s. 4 of the Act; which is a general statement of legislative policy, reinforced by s. 15, where the functions of child welfare officers are described. By s. 15 (1) a police officer who lays a complaint charging a child with an offence must inform either a child welfare officer or the Director of Social Welfare immediately. Section 15 (2) reads as follows: -

"A children's Court or any other Court of summary jurisdiction shall not pass sentence on a child, or make an order that finally determines the proceedings in the Court in respect of that child (other than an interim order or an order remanding the child or committing him for trial or transferring any proceedings to another Court) unless there has been furnished to the Court a report in writing by a child welfare officer on investigations made by him into the circumstances, or unless the Court is satisfied that reasonable opportunity has been given to a child



welfare officer to make those investigations and to make such report or give such evidence."

It is, then, virtually mandatory that the Children's Court receive a child welfare officer's report before disposing of a complaint. The only cases where this is not necessary are those where the Director has advised the Court in writing that a report will not be submitted or where the Court considers the offence to be of a trivial nature (s. 15 (3)).

Similar provisions are to be found in the corresponding legislation of other States and the United Kingdom.<sup>1</sup> For example, in Victoria, the Court is to proceed without regard to legal forms and ceremonies and shall direct itself by the best evidence it can procure or is laid before it, except that it shall not find a child guilty unless it is satisfied beyond reasonable doubt. The welfare officer's report must cover the child's antecedents, home environment, companions, education, school attendance, habits, recreation, character, reputation, disposition, medical history and physical and mental characteristics and defects, if any. The Child Welfare Act 1939 - 1956 (New South Wales) also provides that the report shall deal specifically with these matters, but only if a report is tendered, need it be considered by the Court. It would appear that the welfare authorities have a discretion whether to prepare a report or not. The same position, it seems, would obtain in Victoria, a report being necessary only where it is, on the decision of the officers charged with the responsibility for the social investigation, put before the Court. In Western Australia, the Children's Court may, before awarding any punishment or penalty, have regard to a report as to the offender's antecedents, character, age, health, or mental condition, and to any special circumstances of the case and the nature of the offence. It is to be noted that the Court has a discretion to consider a report, not a statutory duty to do so.

The situation in Queensland is slightly different. The Children's Services Act 1965 (Queensland), s. 65 (2), provides that a child shall not be sentenced to prison, but the Court may, inter alia, order reports of such investigations and medical examinations as appear desirable. The Court will then have regard to any such reports in disposing of the case. It follows, therefore, that any social or medical examination can be authorised only by the Court. Section 145 (2) of the Act is interesting, and could have significant legal repercussions, in providing that the report shall be evidence of the matters it contains. Any possible undesirable consequences are at least mitigated in that the author is liable to cross-examination. The effectiveness of this latter proviso is open to question, as by far the overwhelming majority of child defendants plead guilty and are not represented by counsel or a solicitor. It follows that unreliable material, detrimental to the child, may be introduced by the report, without any realistic opportunity for it to be challenged or put into proper perspective. This is a point that may be taken in relation to all reports under this type of legislation, and with equal force whether the report is prepared on the discretion of the Court or of an administrative agency. This aspect of such reports will be considered more particularly later.<sup>2</sup>

It emerges, then, that there are two important distinctions between the Tasmanian Act and those thus far considered. First it is submitted that the policy of the Tasmanian Act is made quite clear in that the Children's Court is required to consider a background report before disposing of a complaint, and that such reports shall be produced for the Court. Section 15 (3), it is submitted, is merely for administrative efficiency. For any number of practical reasons a report may not be before the Court for each individual case. It may be that the offence is too trivial or that the work load is too great to permit child welfare officers to prepare reports

on each and every individual case. Whatever the reason, it is clear from the Act that such cases are to be the exception rather than the rule. The intention is that if social problems or maladjustment have contributed to the delinquency these factors shall be identified and the Court will dispose of the case according to the policy laid down by the legislature in s. 4. The second distinction is that whilst there is some discretion under the Tasmanian Act (s. 15 (3)) as to whether a report shall be produced, it is not so extensive as in the other statutes. Section 62 (1) (a) of the Children's Services Act (Queensland) is in the terms that the Court shall not sentence to imprisonment a child, but "may" inter alia order reports of such investigations and examinations as appear necessary or desirable. Under the Western Australian Child Welfare Act, the Court "may" have regard to the social background of the child. There, it is the Court which has a discretion whether to seek background information or not. The Victorian legislation confers a similar discretion, but upon the officers whose responsibility it is to conduct the investigation. The position in New South Wales is basically the same as that in Western Australia. In Tasmania, the Court "shall" consider a background report before it disposes of a complaint, and likewise where a child is charged with being either neglected or uncontrollable.

A third difference may also be noted: s. 15 (2) of the Tasmanian Act states that the Court shall be furnished with a report "on investigations.... into the circumstances of the case" or evidence shall be given by a child welfare officer as to the "circumstances of the case". This is a mandate in general terms for the officer to make whatever inquiries he may wish. The statute defines no criteria with regard to which the investigation should be conducted and does not delineate what is to be considered relevant or irrelevant. The officer is to be the sole judge of these matters in

addition to deciding the limits of any inquiries he may care to make. On the other hand, the statutes in the other States define the nature of the inquiry. The definition is almost the same in each case, s. 89 (1) of the Child Welfare Act 1939 - 1956 (N.S.W.) may be taken as typical. That section provides that the report shall set out details of investigation into the "antecedents, home environment, companions, education, school attendance, habits, recreation, character, reputation, disposition, medical history and physical and mental characteristics and defects if any" of the child. This, too, provides officers conducting the investigation with a virtually unfettered mandate to carry out any inquiries they, in their own discretion, deem fit. In view of the wide definition in the other statutes it may well be that the difference between them and the Tasmanian Act is a difference in terminology only. They do, however, provide broad limits. But the general principle is, it is submitted, of some importance. Unless a check is maintained there is no guarantee that unreliable, irrelevant and possibly even scandalous material will not be introduced to the detriment of the defendant and his family, to say nothing of errors of judgment on the part of the welfare officer.

Before leaving other comparable legislation, it may be noted that the Children and Young Persons Act (U.K.) makes provision for background reports to be furnished to the juvenile Court. By s. 35 (2) either a probation officer or the local authority shall render available to the Court such information as to the child's home surroundings, school record, health and character as appear likely to assist the Court. Legislation embodying the same principle is also in operation in the United States and indeed many other countries.

The reception of these reports is a necessary incident of the modern

humanitarian theory for the treatment of juvenile offenders. By statute, the Court is required to have regard, primarily, to welfare and rehabilitation. The orders which it is given special statutory power to make are all directed to the future adjustment of the child to community living. There is no element of punishment, the offender is not being required to atone for any wrong he has committed, no matter how malicious or wanton, except in a limited way. In the place of punishment there is therapy, social work counselling and help, youth counsellors and psychiatric clinics. The nature, causes and cures of juvenile delinquency are far from fully understood.<sup>3</sup> The Courts are, themselves, faced with a dilemma. On the one hand they are faced with the requirement that the welfare of the child shall be the paramount consideration and on the other, that the child is entitled to justice, that he shall be tried fairly and may be heard in his own defence, both as to innocence or guilt and in mitigation. It is these two principles, each valued and demanded by the community, that are becoming more and more difficult to harmonise. In many cases it seems open to question whether they are compatible with each other at all, and in others whether they are capable of simultaneous application. Justice in its classical application may require a disturbed and persistent offender to be removed to a reformatory institution and yet it may be this step that renders the initial deterioration irrevocable. Left in his natural environment with the support of welfare and youth counselling facilities, social adjustment perhaps might ultimately be achieved, instead of reduction to the status of a recidivist. Such achievement could however have been at the expense of a long series of crimes having been committed upon the community. In many cases removal into institutions is effected with reluctance, because the initial introduction may be initiation into a life of crime and degradation from which little, if anything at all, can be

salvaged. This is the paradox. A move, intended to be reformatory, turns out to have the reverse effect.

Looked at from the point of view of the child offender and his parents, the process may not and probably does not, appear to be a helpful one. When convicted of an offence, the offender will have been conditioned by the old idea that bad behaviour merits punishment. That is what he will expect from the Court. The offender, his family and associates will regard the order as punishment, quite regardless of its substance and nature. A first offender on a trivial charge in all probability will be simply admonished by the Bench. He will regard that as a caution that next time he comes before the Court he will be dealt with more severely. He probably will be told as much by the Magistrate. The effect of a first appearance, in many cases will therefore, be to reinforce prior conceptions. If the child should come before the Court again he will expect to be dealt with severely, or, at least, more severely than before. If he is then placed under the supervision of the child welfare authorities, the equivalent of probation for an adult, that will be regarded as the more severe treatment. His treatment will be regarded as still more severe if he is placed in custody. For example, he may be placed in custody for only a short period of observation and assessment; on the other hand he may be placed in an institution for a rather long time. The fact is that he has been before the Court and an order has been made. He will be on probation, or in the second instance, have been put in a home. Whatever the therapeutic intention of those measures, the youthful defendant still sees it as a penalty imposed by the Court. Such a reaction is an entirely reasonable one. Conceivably, there may be some instances where children realise that removal from home or probation is deserved, but it is a punishment they see as deserved, not treatment and help. It is here that Courts and juvenile rehabilitation agencies could in particular cases, be at cross-purposes. The Magistrate

may say to a child, as he places him under a supervision order, or makes an order that will remove him from home, that he is only trying to help, but the order is imperative and for one who is the subject of it the situation may easily be seen in a different light.

Nevertheless, the policy and intention is that the child should be assisted with any problems that have caused him to offend. Indeed, it is often the case that offences are a manifestation of some personal social problem or unhappiness. Lack of adjustment at school or insufficient attention to educational difficulties may cause children to fall behind. Frustration results, which in turn can easily lead to juvenile offences. Some children cannot find the satisfaction and attention they need at home, or they, in some way, lose contact with their parents. Again, this may lead to frustrations which are released in antisocial activities and offences. Boredom is sometimes given as an excuse for illegal behaviour, and, in other instances, the conduct the law forbids is not contrary to the standards accepted by the child. This is often so in lower income and working-class environments. This is not, and is not intended to be, a finite answer to the nature and causes of juvenile delinquency. These factors are mentioned only as some of the characteristics apparently associated with juvenile delinquency. One generalisation may, however, be risked: it would seem that the bulk of detected juvenile crime occurs in lower income and working-class backgrounds and from socially and culturally inferior sections of the community. It is with the children and others from these backgrounds that the statutory social work agencies are almost exclusively concerned, both in the general social work services and in assisting the Courts, both Children's and Petty Sessions.<sup>3A</sup>

In these sections of the community standards of intellect are at their lowest. Personal resources are at a minimum and material wealth at a low

ebb. Collected together here are all the community's most helpless and inadequate people. It is they who have the lowest incomes and, paradoxically, frequently have families larger than average. Education is almost as sparse as material and personal wealth. Employment opportunities are limited to the bottom of the scale, as are most other things in this sector of society. Life, inevitably, is dull, uneventful and routine. Work, because of its arduous or boring nature, provides no sense of fulfilment, except a certain dignity in being able to provide for one's self and family. But when it is over for the day there is neither the energy, time nor personal resource to foster the innate curiosity, imagination and intelligence of children. They are necessarily products of this depressing environment.

Environmental factors have been divided into two classes by Burt,<sup>4</sup> i.e. conditions within the home and conditions outside the home. Poverty of the family, defective family relationships, inconsistent discipline and a vicious home are classified by Burt as having a significant effect upon the development and outlook of children. As to conditions outside the home, companionships and conditions of leisure and work have a marked effect. Referring to a study conducted in London,<sup>5</sup> he said "Allowing for the gross shortcomings, inevitable in estimates so crude, so vague and, in some cases, so largely out of date, these several figures are remarkably consistent one with the other. They indicate plainly that it is in the poor, over-crowded and unsanitary households, where families are huge, where the children are dependent solely on the State for their education, and where the parents are largely dependent on charity and relief for their own maintenance, that juvenile delinquency is most rife".

It is true that this passage was written forty-seven years ago and that it clearly bears reference to social conditions of that time as they



applied in London. But recent research seems to point in the same direction. Dr. D.J. West concluded in a study published in 1970 that "elementary social and economic factors will outweigh the more subtle and psychological factors in the background of our future delinquents".<sup>6</sup> Hitherto, considerable importance has been placed upon psychological factors in the development of children.<sup>7</sup> In ideal social and economic conditions it may be that emotional and interpersonal relationships would be easier and less susceptible to disruption. Although this may be so, it is outside the scope of this thesis to evaluate the various psychological and sociological theories as to the nature and causation of delinquency. They need only be noted. It is in this environment that the legal system must operate and must adapt its approach and technique accordingly.

What becomes obvious is that the legal machinery must be flexible; a standardised, stereotyped approach may be appropriate in one case and not in another. Subject to the general policy that guidance and rehabilitation shall be the objectives of the Children's Court jurisdiction, the Child Welfare Act confers upon the Court a range of options for the disposal of cases. First, the Court may exercise the power conferred by the Probation of Offenders Act 1973 (Tasmania). There the Court may, notwithstanding that the charge is proved and without proceeding to conviction, simply dismiss the complaint. In reaching a decision to make such an order the Court shall have regard to the character, antecedents, age, health or medical condition of the child, or the extenuating circumstances in which the offence was committed. As a matter of practice a good many first offenders before the Court are dealt with in this way. The Child Welfare Act confers, in addition to these powers, special powers

for the disposition of children. The second type of order is that known as a supervision order. This is an additional power conferred upon the Court by s. 23 (1) (b) of the Act. The third power of major importance is the power to declare a child a ward of the State conferred by s. 23 (1) (c)). The Court also has power under s. 24 to order that a defendant be remanded in the custody of the Director of Social Welfare for a period not exceeding three months. The purpose of this is for the Court to be better able to assess the child and obtain further background information. During the remand period he may be placed in an institution, left at home with his parents or placed in the care of relatives. Further reports are compiled as to progress during the remand and presented to the Court for the final decision. The task of the Court is to determine what order it should make in view of the policy of the Act. It is therefore necessary for the Court to be fully informed, not only of the circumstances of the offence, but also as to the personal background and circumstances of the offender. It is to assist in this assessment that background reports are prepared by welfare officers appointed under the Act. The Court is then in a position to make an order that is appropriate to the circumstances of the individual case (thus avoiding stereotyped repetition).

#### ADMINISTRATIVE PROCEDURE FOR THE PREPARATION OF REPORTS

As already explained, the police must inform the Director or a child welfare officer where a complaint is lodged against a child. The date the case is listed for hearing is also, as a matter of practice, notified. What usually happens is that the Department of Social Welfare is supplied with a copy of the complaint to be filed in the Court. This states the name and address of the child, the actual offence, and the date and venue of the hearing. Such information is usually provided well in advance of

the hearing in order that the report may be prepared in time.

(1) Community Investigation

Upon the receipt of the copy of the complaint, a child welfare officer visits the child and family. What purports to be a full social investigation is then carried out. The officer will usually seek information as to the family background generally. In this regard, he may inquire from local authorities, such as the police or school, as to the general esteem in which the family is held in the district, whether it is a responsible law-abiding family, or is it regarded with suspicion and distrust. Does it conform with the local community or is it out of step, and if so, in what way? Depending upon the extent of the local resources, this in itself may be quite a revealing and extensive investigation. There is one particular case in the author's experience where a family was described by a school principal as the worst in the school, yet on contact with the family nothing emerged that would have indicated such a reputation. Assessment of a family or an individual can be difficult and misleading unless properly carried out by adequately qualified people. There may be some objections to making general inquiries about families, but in this respect it is useful and may place in proper perspective any impressions gained from personal contact and any conclusions that may be drawn from such contact. Day to day experience is not to be written off and summarily ignored in favour of isolated and infrequent personal contact by an investigating officer who is a stranger in the district and to the child and family. By gathering information widely, it is possible to build a fairly comprehensive picture of the family as members of the local community. It may be mentioned that community activities and interests are often regarded as indicative of the personality and outlook of the subject of the investigation. Indeed it is usually information of that nature which is sought. Inquiries at the school

will be directed towards the child's behaviour, his outlook in general, the type of companion he usually associated with and whether any social problems have become manifest. If any deficiency is revealed, then it may be probed more deeply. This will usually be in addition to inquiries as to the child's intelligence, scholastic progress and ability. This area, too, provides quite extensive information. The subject is seen as an individual in that his personal progress is examined and any personal attributes or defects revealed, he is also seen as a member of a group. From this it is hoped to infer whether he is within the limits of normality and, if he is not, then to ascertain the reason. It is readily seen, that unless this type of investigation is carried out properly it may at worst be harmful and at best misleading. As far as school inquiries are concerned, they should include reports from the teachers in direct contact with the child, in addition to the headmaster and any expert opinion that may be available from the school vocational guidance officer. The danger is that many reactions may be merely impressionistic and could be motivated by personal bias or dislike, or favourable reports may be given for other personal reasons where they are not warranted. Unless sufficient care is taken reports may be given upon the basis of inadequate information.

The school is probably the most important source of external investigation, but there are others. Probably the most significant would be the local police. Valuable information may be obtained as to the kind of companion with whom the child spends his leisure time and in what ways. If his leisure time seems to be unsupervised, this is most likely to be known to the local constable. Parents of children before the Court often give as a reason for the misbehaviour that the child had fallen under the influence of undesirable companions. If that is so, then the general nature of the companions becomes important and some inquiry is usually

directed to elucidate why he has been allowed to fall into such company in the first place. Companionships are regarded as being significant because children having social problems often associate with youngsters having similar problems. This factor has been noted several times,<sup>8</sup> and the social investigation would not be complete unless it had been considered. For this reason, the nature of the child's associates may point to a mode of investigation that could reveal some problem that has been latent. On a more humble level, it also serves to put in correct perspective any claims by incompetent parents that they exercise vigilant care and control. There is another case in the author's experience where a fifteen year old boy was left sitting in his father's car outside a country hotel for four or five hours every Saturday evening while his parents were inside drinking. When the boy finally began associating with a local gang during these evenings the parents claimed that he had escaped through his bedroom window. Again the police are often able to provide information as to the local reputation of the family: whether, for example, the parents are regularly under attention for drinking and leaving the children to their own resources, whether the father is under constant attention for offences in the district or is constantly on the suspect list when an offence needs police investigation. This is the kind of information most frequently provided by police.

The results yielded by such investigations may fall into either or both of two classes. In the first place the status of the family and the child as members of the community is revealed. In other words, the kind of family or child, they are or he is, becomes known. The second class of result is that some assessment of the pressures exerted by the community upon child and family becomes possible. Where individual children and

families become known to the police, they may be given a disproportionate degree of attention. That usually happens where it is considered that a certain child would be better moved to an institution, since he is a nuisance in the community, almost always in trouble at school and seems to be beyond the control of his parents. Pressure of this nature could, of course, be harmful in that it confirms in his mind that he is naughty and lowers his self-esteem and confidence. What may only be a misdeed, could be converted into confirmed antisocial conduct. The investigating officer will usually make some attempt to assess this type of pressure. It may be noted that the same consideration also tends to apply in the school investigation. A child who is always under the adverse attention of his teachers for breaches of discipline often has to cope with attempts to have him removed from the school, a situation which the author has encountered on several occasions.

One specific instance is noteworthy. In that case a fourteen year old boy had reached his first year of secondary schooling. He had been before the Children's Court several times previously and was to come before it again on a charge of breaking, entering and stealing. His brother had broken the door of a vacant house nearby and he and his brother had taken the washing machine from it to their own house, which was without one. The school reported that the boy was an incorrigible disciplinary problem. In addition, he showed no interest in his work, was a disruptive influence in class and would not learn. The guidance officer reported that he was in a special class for slow learners where he had made no progress and confirmed that he was disruptive. It was found that he could not write his own name nor could he read. The strong recommendation of the school was that he should be removed to an institution. His home was drab and dreary in the

extreme. The mother had died some years before and the family was in the care of the father, who was in ill health and his sixteen year old daughter. The atmosphere was stale and dirty and quite without positive stimulation of any kind. The defendant and his fifteen year old brother, with whom he was charged, were left to their own devices to roam at large. They were well-known in the district as wanderers and were involved in many kinds of petty mischief too numerous to name. No attempt was made by the father to interest them at home. It appeared though that the fault of the home was more the absence of positive influences than the presence of bad ones. The father had a war injury which left him with a physical disability, he spent much time in bed at home, or in hospital. He was a man of low intelligence and no education. The daughter blended perfectly into this situation. She was dirty and slovenly, entirely lacking in interest and responsibility. Since leaving school she had kept house, ostensibly, but how she really spent her time was unknown. Conditions in the home were not such that would engender the interest of fourteen and fifteen year old boys. So they too lost interest and used the house only for meals and sleeping. In the result they became, as already mentioned, well known wanderers. Both were chronic school truants and were well known to the police because of this, their wandering and petty trouble. The fifteen year old was attending a school for the mentally retarded and so is not relevant here. Considerable pressure was exerted by the school and the police for the younger boy's removal to an institution, not because of any reasons connected with his welfare, but because he was a nuisance. Pressure was exerted both in the way the background information was presented to the author as the investigating officer and also in the attitude to the boy. Finally, having regard to the conditions at home and the fact that the school did not provide any worthwhile education, he was

declared a ward of the State and placed at a home for educationally retarded boys. In that setting he was given careful individual attention and reading lessons from the Matron. With proper support and stimulation from the institution it was soon found that he was making progress. Along with all the other boys he attended an ordinary school outside the institution, he was no longer a disobedient and disruptive influence in class, he took an interest in his work, and although working at only primary school level, he soon mastered simple reading and writing. He became interested in the activities at the institution, often volunteered to do gardening and other chores and mixed well with the other inmates. This attitude flowed on to his special reading lessons with the Matron. When she forgot, she would be reminded and was often pressed to give additional time. The delinquent wanderer and truant of a year ago could no longer be recognised.

This is an example where the external factors had a major influence upon the decision. The deteriorating school situation, coupled with the wandering and truancy and offences arising because of it, were the crucial factors influencing the Court in reaching its decision. These would not have been revealed by confining investigations to the boy and family alone. Had he been older, for example, he might have been committed to an institution for delinquents which lacked the facilities for education and which would have provided an inappropriate environment for his individual problem.

## (2) HOME INVESTIGATION

The second line of investigation in the preparation of a social background report is that of visiting the family of the defendant. Here, the object is to examine the offender as an individual in an attempt to determine the reason behind the offence and to determine whether he is in



need of the services of a statutory social work agency. The aim is to be helpful and sympathetic and not just punitive. In this investigation, the whole background of the child will be subjected to scrutiny: from the moment of his conception to the moment of investigation. Social case work is based upon Freudian psychology and emotional relationships in the family are held to be of the utmost significance.<sup>9</sup> Thus the whole range of relationships in the family will be scrutinised. The relations between the parents and the manner in which they manage the children and, in particular, the offender are inquired into and an attempt is made to assess the probable impact upon the child in question. Such questions as the ability of the child and the parents to understand each other are looked at and evaluated. Is he given too much or too little attention? Does he have sufficient control and is he given enough latitude for self-expression? On the part of the child, his response to his parents is probed. How does he respond to discipline and control? These factors are examined against the family background as a whole, i.e. against any result that may have been revealed by the inquiries within the community and what impressions the officer may have been able to glean from his interview.

The house may have been dirty and untidy and there may have been signs of persistent neglect. This is especially obvious when the neighbourhood is a tidy one. The family may be distinguished from the neighbours by this and by untidy and unclean dress. It must be ascertained what, if any, effect such an environment has on the child.<sup>10</sup> Again, the relationship of the offending child with his siblings will be examined. The purpose is to see whether he is outshone by them and is engaging in delinquent behaviour to compensate and gain attention. What is often regarded as an important aspect of the home inquiry is the attitude of the

child and parents to the offence and more particularly, the attitude of the parents in the event that there is some social factor underlying the situation. It is generally thought that social work services are most effective where there is mutual trust and co-operation between the social worker and his clients. Unless the confidence and co-operation of the family can be obtained there is little that can be accomplished by such devices as supervision orders.

In addition to these matters, the juvenile is considered as an individual. He is interviewed by the officer, sometimes in the presence of his parents and, with his parents' consent, preferably alone. The aim is to gauge how he feels generally and how the offence came to be committed. Attempts are made to ascertain the child's feeling towards his parents and siblings and his attitude at home generally. It is hoped to find out whether he has any social problems and what assistance would be appropriate if he has. His adjustment at school and in the community is also investigated.

Stress is laid upon the state of emotional relationships during infancy and early childhood. Bowlby<sup>11</sup> has said that emotional relationships during infancy are crucial for proper personality development. Every attempt is made to learn the nature of the child's relationship with his mother during this period. Such factors as separation are carefully noted. Another area to which careful attention is given is in determining whether there are any behavioural characteristics that might provide evidence of brain damage.

Upon the basis of this information, the officer prepares his report for the Court. It is obvious that many of the factors that come under investigation require the expert attention of psychologists and psychiatrists. Psychological assessment of delinquent conduct in juveniles

is a highly technical matter, and is outside the scope of this thesis. But it is essential for the complexity of the task to be recognised so that Court reports may be seen in true perspective and against the complete background of the social and medical sciences as they bear upon the assessment and treatment of delinquents. Psychological factors are subtle and complicated and beyond recognition by other than experts; some insight into this area is given by a study of D.H. Stott in "Delinquency and Human Nature".<sup>12</sup> When pointed out many kinds of deviant conduct may be seen as logical compensation or substitution for some lack in the delinquent's life, the difficulty is to recognise the conduct for what it is and apply the appropriate remedy. In general, the above would be the minimum requirement for a proper social investigation. It has been said of probation reports for adult offenders and the same could also be true of Children's Court reports, that reference should be made to the following matters: - details of the actual offence, previous record, information about co-defendants, a general social history (development, health, education, employment, habits, character, behavioural patterns, associates, recreation, family life, mental health and physical condition) and as much of the family history and relationships, circumstances in the neighbourhood, with special reference towards the offender and his crime and a programme that might be developed if he were placed under supervision. In addition to this, the report should contain information about the personality of the offender, including the results of psychiatric study if he has been examined, social service exchange information from agencies that have previously been interested in him and an analytical summary of his history and problems with a recommendation to the Court concerning sentence.<sup>13</sup>

An investigation of this magnitude raises problems, themselves of no mean proportions. In the first place, the reliability of the basic information

must be determined. Much reliance must, of necessity, be placed upon data supplied second hand to the investigating officer. Obvious examples of this are school and police reports. It is not suggested that these will be invariably coloured one way or the other according to the subjective bias of the particular teacher or police constable, but it is a possibility worthy of attention. Again, reports may be influenced by the reporter's notions of what ought to be done with the offender. Such factors need to be borne in mind when assessing the value of reports which are tendered to investigating officers second hand where primary resources are difficult, if not impossible, to check. Other parts of the investigation may be capable of direct assessment by the officer. For example, he will see the child and the parents personally. But, as already mentioned, the impressions gained must be assessed against the environment as a whole. An isolated visit cannot replace opinions formed over lengthy and close association. The point is that most of the social report is based upon information obtained second hand from primary resources and much of it is therefore likely to be impressionistic. That is not to say reports are unreliable, but it is a matter that should be considered when assessing the circumstances of the case generally. For this reason it is submitted that it would be desirable for reports to indicate sources of information to ensure some check on reliability.

Since these reports usually carry great weight, the officers preparing them carry considerable responsibility. For this reason it would be desirable for certain inter-departmental consultation to be mandatory. The object of this would be to eliminate, so far as possible, the errors of judgment, both as to the assessment of circumstances of the case and as to the appropriateness of any programme that might be suggested in the report. It follows too, that there should be consultation with any allied agencies that may be concerned in a proposed programme. If psychiatric treatment is suggested, for example, there should have been sufficient discussion to

ensure the psychiatric agency will work in co-operation with the officers carrying out the order of the Court. There is a need for proper co-ordination of all agencies having dealings with any individual referred by the Court. Lack of such co-ordination defeats the purpose of the Court and is confusing and unsatisfactory for the individual concerned. It is obvious, of course, that this could not be written in as a provision of the statute. Any attempt to reduce rules of social casework practice to statutory form would be both excessively rigid and unworkable, although such co-ordination could be achieved by proper administrative directions and is an additional matter that should be considered by the Court when evaluating the report. A programme for an offending child can only be effective if it can be realistically administered and therefore the report should contain sufficient information for the Court to make the necessary assessment.

The responsibility for the decision as to the disposal of a case is for the Court alone. It cannot be fulfilled by administrative welfare bodies and the situation should not be allowed to develop where it, in effect, happens in that way because the Court is in the hands of the child welfare authorities. This is a matter of some importance because it is a situation that could easily develop where the Court is entirely dependent upon reports. That is not to say that the Court should never be persuaded by reports or by other expert guidance. The juvenile jurisdiction is highly specialised and important and expert guidance is essential. But at the same time the Court is the individual's only protection against over zealous officers and agencies dictating what should be his best interest and what he should require for his welfare. Likewise, the Court is his protection against errors and misjudgment. The point is that the report should contain sufficient detail to enable the Court to judge, first, the

reliability of the report itself and, second, the reality and effectiveness of any programme that may be instigated as the result of any order the Court may make.<sup>14</sup>

At this juncture it is worthy to note that the method of investigation may also militate against one of the basic objectives of the Children's Court concept. As noted above, inquiries within the community are often an important part of the social background investigation: by their very nature however, they reveal the identity of the child and also that he is required to appear before the Court. Once that fact is known to even a small number of people in the local community, it would seem reasonable to expect that the news would spread. The policy of the Act is quite clear. Section 17 provides that only the persons directly involved in the case shall be entitled to admission to the Court and, by s. 18, publication of the proceedings, except by consent of the Attorney General, is prohibited. To this extent it would seem that a proper background investigation and complete confidentiality are incompatible.

#### RECOMMENDATIONS

Most reports conclude by making a recommendation to the Court as to the manner in which the child should be dealt with. These recommendations extend from suggestions such as that since the home background is stable and the offence trivial the child should simply be discharged to the far more drastic recommendation that he should be declared a ward of the State. Between these two extremes there are several intermediate alternatives: namely supervision orders, remands and fines. The object of the recommendation is to suggest how the child welfare and rehabilitation facilities may best be utilised to suit the special circumstances of each individual

offender. They also indicate to the Court the type of order that would be in the offender's best interests. The need for some guide of this nature is obvious when the diverse nature of the rehabilitation machinery is realised. On the one hand there are the field services of the Social Welfare Department which enable the rehabilitation work to be undertaken with the child remaining in his own environment. This may need to be supplemented by such specialised agencies as psychiatric counselling for the child or marriage guidance for the parents. On the other hand there are the residential establishments, all differing in nature and geared to the needs of specialised categories of youths.<sup>15</sup> For cases requiring psychiatric attention there are mental hospitals. The whole objective of the Children's Court institution is to select, with expert care, the course which is most suitable for the welfare and adjustment of the child. In this respect the comments and suggestions of those who will be providing services and translating any proposed programme into practice, are invaluable. It is not to be overlooked, either, that quite subtle factors may operate within the family group of which the Court will be unaware unless they are revealed in the report. Such a case in point will be one where the child's sense of shame and failure is so intense that a supervision order could produce the reverse effect from that which was intended or may create problems that otherwise would not have occurred. In this situation, the choice is between the risk of an order intended to correct some problems with the child or allowing them to run their course unaided. A recommendation from the investigating officer is valuable to the Court in a decision of this nature.

As against this, it may be argued that since the sole responsibility for the disposal of the case is with the Court and that as the Act does not

provide for recommendations, they are out of order. The Australian statutes do not specifically mention recommendations in discussing reports. As far as the statutes are concerned, it is submitted that recommendations are neither authorised nor prohibited. Judicial attitudes may well vary. The view has been expressed by Watson that recommendations should always form part of social background report: -

"It is submitted that the probation officer should always conclude his report with some recommendation upon the treatment he thinks is called for - as, for example, if the juvenile is to remain at home, he will be likely to respond to supervision. There are still Courts where the Magistrates do not even permit their probation officer to make a recommendation whether the accused person is suitable for probation; and who resent it if an outside probation officer, attending their Court, presumes to do so. With respect to such Magistrates their attitude is absurd and was condemned by Lord Goddard when he was Lord Chief Justice. The Horison Committee recommended that, if a probation officer is able to form an opinion about an offender's likely response to probation, he should volunteer it. That is surely only commonsense. Who is better qualified to express an opinion whether supervision has a good chance of succeeding, or a bad chance, than the officer who has met and made inquiries about the person to be supervised and upon whom if an order is made the duty of supervision will fall?"<sup>16</sup>

With respect, it is submitted that this is the preferable view. The suitability of one course of action or another can best be judged by those who have the most direct knowledge of the facilities and direct responsibility



for the implementation of the proposed programme. It cannot be stressed too strongly that the final responsibility is with the Court. However, provided that is the case and that the report is sufficiently reliable and contains sufficient reference to primary data and sources for its reliability to be assessed, it is submitted that there is no abdication of the Court's role by receiving recommendations.

#### LEGAL STATUS OF SOCIAL BACKGROUND REPORTS

Section 15 (2) of the Child Welfare Act provides, inter alia, that a Children's Court or any Court of summary jurisdiction

"shall not pass sentence or make an order that finally determines the proceedings ..... unless there has been furnished to the Court a report in writing by a child welfare officer on investigations made by him into the circumstances of the case ..... or evidence has been given by a child welfare officer on the investigations".

The obvious legislative intention is that reports will be supplied and considered, except where it is not possible, or the offence is of a trivial nature. Details of the relevant statutes in other States vary, but the essential principle is the same. The Court has the jurisdiction to receive and consider a welfare report.<sup>17</sup> Since these reports are prepared and submitted under statutory authority it cannot be objected that they contain matters of hearsay or that they are tendered by persons who have no interest in the proceedings. Both consequences follow inevitably from the nature of the proceedings and as a logical consequence of the statutory provision. The mandate the Court is given is to make an order which will be in the best interests of the child and it cannot achieve

that result unless it has at its disposal sufficient personal information. The Children's Court, however, is a Court of law and must act judicially. As the learned editors of the 7th. Edition of Clark Hall and Morison on Children observe

"The inferior Courts have not those inherent powers over infants which have for centuries been entrusted to the Chancery Courts and those inferior Courts cannot assume that what may be done in relation to the guardianship of an infant by a Judge of the High Court can necessarily be done by them. The jurisdiction of a juvenile Court is strictly limited by statute and the Justices must ask themselves before they perform any Act what is their statutory authority for doing it."<sup>18</sup>

The Children's Court must, then, keep within the powers which have been conferred upon it by statute. This principle, however is more easily enunciated than applied in practice.

Determination of what is in the best interest of a juvenile offender is a judicial matter. It follows therefore that accepted judicial procedures must be observed and that justice must not only be done but must be seen to be done. It is this concept that must be harmonised with the juvenile Court concept, a view put forward by Knight-Bruce V.C. in In re Flynn,<sup>19</sup> where it was held that the Chancery jurisdiction over children could be exercised only in accordance with the law. The Judge, he considered, was not free to adopt a course that he may personally consider to be in the child's best interest. Any power of the Court must be exercised judicially and according to the law as it applies to the case at hand. A jurisdiction that held the infant's welfare to be the paramount consideration must be exercised according to this concept. This view was reiterated in 1893 by Lord Esher M. R. in R v. Gynall<sup>20</sup> where he said: -

"The Courts must, of course, be very cautious in regard to the circumstances under which they will interfere with the parental right. As Knight-Bruce V.J. said in re Flynn,

"The court must not act as if it were a private person acting with regard to his child. It must act judicially in the exercise of its power..."<sup>21</sup>

A modern exposition of this problem is to be found in the judgment of the Court of Appeal in England in In re K (Infants).<sup>22</sup> There a mother applied by an originating summons to the Chancery Division for her two children, aged nine and ten, to be made wards of the Court and for custody, care and control. The children were made respondents to the summons and the Official Solicitor was appointed guardian ad litem. Subsequently, the Official Solicitor lodged a statement of facts with the Court, in which he recommended that the mother should take the children to a psychiatrist. He also submitted a confidential report, to which the parties had no access. In due course the mother took the children for the psychiatric consultation and, upon the resumption of the hearing, the Official Solicitor tendered a further statement and another confidential report to which the medical reports were annexed. Both of the statements, but neither of the confidential reports, were disclosed to the parties. The mother contended that she was entitled as of right to see them. Her contention was rejected and she appealed to the Court of Appeal. Allowing the appeal, the Court held that the determination by a Court of what was in the best interest and welfare of a child was a judicial inquiry. The Court approved the paragraphs from In re Flynn and R. v. Gwyll already referred to.

In Tasmania, r. 42 (4) of the Justices Rules provides as follows: -

"The justices may, before imposing any penalty, receive such evidence or statements as they think fit in order

to inform themselves as to the circumstances of the case or the penalty proper to be imposed or order to be made".

The relevance for the Children's Court, it is submitted, is that the Court is subject to the Justices Act, is a Court of law and as such is bound to apply the law as established by the ordinary canons of procedure and justice. Section 13 (6) of the Child Welfare Act provides that the Justices Act applies to a Children's Court, except as expressly provided. It is nowhere expressly provided that the Children's Court may adopt procedures that are not judicial. Consideration of background social reports must, it is submitted, be conducted judicially. Under s. 15 of the Child Welfare Act the Court is merely directed to consider a report, except where it is either impracticable or impossible. By s. 4 the Court is directed that where a child is found guilty, he shall be treated as one who is or has been misdirected or misguided. The Act is remarkably devoid of any direction of the procedural policy that shall be followed in the sentencing aspect of the proceedings. In fact, the definition of a Children's Court in s. 13 (1), it is submitted, puts beyond doubt any question that, in exercising a paternal jurisdiction, the Court may adopt a procedure that looks to welfare at the expense of justice. Section 13 (1) provides that: -

"Courts of summary jurisdiction constituted in accordance with this Act and sitting for the purpose of hearing a charge against a child or for the purpose of exercising any other jurisdiction conferred on Children's Court by or under this or any other Act shall be known as Children's Courts".

The Children's Court is, therefore, a Court of summary jurisdiction constituted according to s. 13 of the Child Welfare Act. There is nothing

in the Justices Act or Rules that enables any Court to act other than judicially. On a policy level, it is clear that the legislature intended that the Court should have regard to the future adjustment and welfare of the juvenile. This is made clear from the provisions of ss. 4 and 15, and the range of options within the Court's power for the disposal of offenders. The policy is not, it would seem, stated fully in s. 4, but it may be inferred from the scheme of the Act generally. The policy must, however, be administered by the Court within the procedural framework that applies in any other Court of criminal jurisdiction.

Being, then, a Court of summary jurisdiction, the Court is bound by the rules of evidence and procedure that prevail in adult Courts. Each Court, both juvenile and adult, has explicit statutory jurisdiction to inquire into the circumstances of each offender and the circumstances of his offence in an attempt to determine the proper penalty. Rule 42 (4) of the Justices Rules has been considered by the Supreme Court of Tasmania: in Dale v. Peterson<sup>23</sup> Nettlefold J. held that the Rule (and s. 386 (7) of the Criminal Code) conferred a discretion which, like all discretions, must be exercised judicially. The Court must not go outside normal judicial procedure. It is submitted that this principle applies equally to the Children's Court. Certainly it is true that the Child Welfare Act prevails where it diverges from the Justices Act. Under the Justices Rules, the Court has a discretion to call for information as to background circumstances. The Child Welfare Act provides, on the other hand, that the Court shall consider a report before it determines a case except in the cases expressly mentioned in s. 15. This provision however is more than a mere discretion: the Act casts the duty to receive a report upon the Court, unless the case comes within one of the exceptions under the Act. Superficially, this may be said to be a distinction, that contrary provision has been made and the

Justices Rules have no application. However, the actual issue, it is submitted, is whether the Child Welfare Act confers upon the Court a power that need not be exercised judicially. What must be considered is not only the precise phraseology of the two enactments, but the actual content of the jurisdiction conferred: namely, that the Court shall be seised of the background as to the offender and his offence before passing sentence. In this respect, the provisions are not materially different and the Children's Court is bound to act judicially.

If the Court must act judicially, it follows logically that justice must not be done in secret. All the material upon which the Court acts should be disclosed to the parties who are rightly interested. In the case of In Re K (Infants) it was held that it was fundamental to any judicial proceeding, and a major premise of British justice, that an interested party must have the right of access to any information put before the Court and the appropriate opportunity to challenge it if necessary. It followed, therefore, that before the Court took into consideration the confidential reports of the Official Solicitor their contents must be disclosed to the parties. The point which held the greatest sway with the Court of Appeal was that justice must manifestly be done and that all the material upon which a Court comes to its determination must be subject to the scrutiny of the parties. The Court recognised that it may be harmful to reveal the contents of confidential medical and psychiatric reports in cases concerning infants; although this point was not sufficient to displace such a fundamental canon of British legal procedure as the publicity of proceedings. To do otherwise would be to defeat one of the ends which justice is designed to achieve.

Insofar as background reports for Courts under such legislation as the Tasmanian Child Welfare Act are concerned, there is a dearth of case law.

It is therefore, necessary to examine analogous situations in an attempt to deduce principles and try to determine whether such principles have any application under the Children's Court legislation. Convictions will be quashed in the United Kingdom where the Juvenile Court Justices interview a witness in private in the absence of the accused (R. v. Bodman Justices: ex parte McEwan)<sup>24</sup> or where the clerk retires with them (R. v. Barry Justices: ex parte Kashim)<sup>25</sup>. The principle is that justice must manifestly be seen to be done. Legislation has clarified the position as to the entitlement of the accused to see the report in adult Courts. Section 43 of the Criminal Justices Act 1948 (U.K.) provides that the accused in an adult Court shall be given a copy of any probation report that is prepared. That, however, does not apply to a juvenile Court. Presumably, then, R. v. Bodman Justices ex parte McEwan and R. v. Barry Justices ex parte Kashim applied to ensure that the juvenile Court conducts its proceedings judicially, but does not put beyond discussion the right of the child or his parents to see the social report. The problem of Courts acting judicially in regard to specific information was considered by the Full Court of the Supreme Court of Victoria in R. v. Metropolitan Fair Rents Board.<sup>26</sup> There the Court said: -

"A tribunal which is bound to act in a judicial manner and therefore to observe the principles of natural justice is bound to disclose to the parties any specific information or evidence received in the course of an inquiry relevant thereto, unless legislation governing its duties negative that obligation".

The question is whether the Child Welfare Act negatives the obligation to act judicially in denying the accused child and his parents the right to see the child welfare officer's report.

REPORTS UNDER s. 85 (2) OF THE MATRIMONIAL CAUSES ACT 1959(COMMONWEALTH)

The Court may, under s. 85 (2) of the Matrimonial Causes Act receive in evidence a report as to the welfare of the children of a marriage which is the subject of divorce proceedings. This usually arises in custody disputes or where the Court wishes further investigations as to the proposals of the parents for the care of the children after the decree has been granted. Section 85 (2) provides as follows: -

"The Court may adjourn any proceedings until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the Court considers desirable and may receive the report in evidence."

There are two interesting features about this section. In the first place, the Court may delineate the scope of the investigation. The inquiry may be confined to certain aspects of the welfare of the children, such as accommodation or school facilities. On the other hand, it may be a full social investigation covering every aspect of welfare, family relationships and health. The investigation is, thus, kept within reasonable confines and relevant matters and, at the same time, gives the welfare officer guide lines to follow regarding the nature and extent of his examination, although it need not be an investigation at large, as in the case of social reports under the child welfare legislation. The second feature is that the report may be received in evidence. That means that the report becomes a document before the Court and the parties have the right to see it. There is indeed clear authority to this effect. Section 85 (2) was considered by Barry J. in Reeves v. Reeves (No. 2),<sup>27</sup> where it was held that the parties had the right to see the document, since it was before the Court in evidence: -



"The effect of this provision .... is to make admissible a document that would otherwise be inadmissible. I think it is clear that if the document is received in evidence the parties are entitled to see it and in this instance have done so. The expression "received the report in evidence" must contemplate that the report is to be available to the parties when it becomes part of the material before the Court in an adversary proceeding...."

His Honour then quoted the passage from R. v. Metropolitan Fair Rents Board already referred to. A further implication is that, in preparing the report, the officer is an agent of the Court and may be cross-examined which, however, will only be allowed in exceptional circumstances. Further, the parties are not bound by the contents in the report and fresh evidence may be called.<sup>28</sup> This does not mean, though, that the welfare officer must observe the strict rules of the ultra vires doctrine in the conduct of his inquiry and in the preparation of the report. Nor will any transgression outside the terms of reference set by the Court result in the whole document being ruled inadmissible. Nor will it mean that the welfare officer is impeded in the investigation. The restriction is upon the Court, in that the judge must not take into consideration any parts of the report that are outside the terms of reference and the remainder must be given only such weight as the sources justify. This problem was considered by the Full Court of the Supreme Court of Victoria in Votskos v. Votskos.<sup>29</sup> There, the judge asked for "a report as to the conditions and circumstances in which Maria Votskos, the child of the marriage, is or would be living with the petitioner or the

respondent". The Court held that the sole authority for the report was s. 5 (1) and s. 85 (2) of the Matrimonial Causes Act. These provisions showed: -

1. That the report was admissible in evidence
2. That the judge had power to request it; and
3. That it may be requested in relation to any matters relevant to the proceedings and being such as the Court considers desirable.

The Court also considered that the report was not to be discarded merely because the welfare officer had exceeded his mandate, so long as the Court considered only that part which had been requested. In this regard, the Court quoted with approval a passage from the judgment of Gowers J. in Priest v. Priest: -<sup>30</sup>

"It will no doubt be inevitable as happened in the present case that the welfare officer will travel outside the mandate given to him and in so doing introduce matter of hearsay, but as long as the judge excludes from consideration that which has not been asked for and gives to what has been asked for only such weight as its sources properly deserve, the procedure is not likely to render itself susceptible to impeachment. To impose more stringent requirements upon welfare officers who are not trained as lawyers, or a greater limitation on the use that may be made of their reports by judges hearing these cases, would be likely to emasculate a useful procedure".

As far as these reports are concerned, then, it is necessary that they should, within reason, be confined to the questions asked by the

Court. Since they are to be received in evidence, it follows that the parties should have access to them and be permitted to call evidence to the contrary if they think they should do so. It seems to be implicit in the Court's attitude that the report should contain sufficient reference to sources to enable the Court to evaluate fully the comments of the welfare officer and to determine what weight should be accredited to any comments or propositions it espouses. This approach is particularly valuable as it enables the whole situation to be seen in perspective and the Court will not be faced with a report that may be unreliable, but cannot be detected as being so because its sources are not identified. Unfortunately, such problems often occur in many child welfare reports. Bland statements are simply made and, as sources are not revealed, the reliability of the report is difficult, if not wholly impossible, to evaluate.

#### REPORTS BY PROBATION OFFICERS

Both the Courts of Summary jurisdiction and the Supreme Court may order reports upon offenders pursuant to the Probation of Offenders Act 1973 (Tas). s. 5 provides that the Court may receive as evidence a report of a probation officer on matters relevant to the Court's decision whether to conditionally release the defendant or as to the sentence proper to be imposed.

This Act puts beyond doubt the legal status of the report and the rights of the offender where he wishes to controvert it. Section 5(2) provides that a copy of any written report shall be given to the defendant or his attorney. The only exception is where the Court orders that it shall not be so given or shown only to the defendant's Counsel under s. 5(3). Where the Court receives a report, the defendant must be given the opportunity to controvert it. Finally s. 5(4) provides that no objection

shall be allowed that the report contained matters of hearsay.

It is interesting too to note that a wide view of the role of the probation officer has been endorsed. Not only may the Court order a report as to whether it should impose a probation order, but under s. 5 (1) (b) may also receive a report as to the sentence proper to be passed on a convicted person. This gives statutory recognition to the probation officer as an expert on sentencing generally, his role is not confined to advising whether a particular offender is suitable for probation.

In view of the differing statutory provisions it is no longer possible to draw any analogy between probation officers' reports and those prepared by child welfare officers under the Child Welfare Act. The Child Welfare Act does not provide in express terms that the report shall be received as evidence, nor does it provide that it shall or shall not be disclosed to the offender. However, prior to the Probation of Offenders Act 1973 (Tas.) probation reports for the Court of Petty Sessions were prepared under pursuant to rule 42 (4) of the Justices Rules. As that rule confers a jurisdiction similar in content to that conferred by the Child Welfare Act some guidance may be obtained from the cases which arose under it.

The whole issue of probation reports came before the Supreme Court of Tasmania in Van der Linden v. The Queen.<sup>31</sup> There the sentence imposed by a Magistrate was challenged on the ground that the probation officer supplying the report had had a conversation in private with the Magistrate. It was not alleged that anything improper had been said by either: the point being simply that the conversation had occurred at all. Crawford J. held that the sentence must be set aside because a private conversation in the absence of the accused is not a judicial exercise of power and was not permitted by

Rule 42 (4) of the Justices Rules. This rule, His Honour held, was the starting point. All that is said in regard to sentence must be said in open Court in the presence of the defendant. The rule does not authorise private communications to which the accused is not privy. The principle to be followed was that stated in Re K (Infants). The complaint in Van der Linden was that the probation officer had seen the Magistrate in private. However, the same principle would apply also to written reports. If the principle is that all which is relevant to sentence must be revealed to the accused, it is not material whether the information is conveyed by spoken words or written reports.

A written report is in a different category from an oral statement, because although the Magistrate may see a report in Chambers before he comes into Court, when he comes into Court he will show it to the accused. In this case, Crawford J. said "there should be no suspicion of any miscarriage of justice". The Court must afford the accused the opportunity to deny or explain the report prior to sentence. The distinction between reading a written report in Chambers and receiving an oral report in Chambers is, of course, obvious. Even though the Magistrate may repeat word for word what he has been told in private, the accused, having regard to all the failings of human nature, could never be sure that such was the case. The same criticism could not be made of a written report.

This principle was applied by the Supreme Court in the case of Friebe v. Williams.<sup>32</sup> There the accused were charged under the Dangerous Drugs Act and the Magistrate ordered a probation officer's report. A conversation occurred between the Magistrate and the probation officer in the privacy of the Magistrate's Chambers and on an appeal to the Supreme Court the sentence was set aside.

Neasey J. said

"It has been pointed out that penalties will not be allowed to stand where Magistrates confer in private with probation officers".<sup>33</sup> The principle involved was that justice had not manifestly been seen to be done.

If the report must be disclosed to the accused, it follows there may arise sometimes the situation where the accused disputes some material particular. It seems that, as the rules under which background reports are received do not authorise the Court to transgress the ordinary rules of evidence and procedure, the conflict must be resolved in the ordinary way, namely by a judicial determination following evidence from the parties. This is a problem that could arise just as easily in the Children's Court as in the adult jurisdiction. In fact, it may well be more serious there than in an adult Court because children are rarely represented by Counsel and are less articulate. Parents usually have no knowledge of the legal rights of children before the Court and under pressure and distress may be no more articulate than the child. By pleading guilty, an offender admits no more than the essential elements of the offence. He admits no more than the legal elements necessary to establish his guilt. In particular, he does not admit that the contents of any social background report, be it from a probation officer, child welfare officer or the police prosecutor, represents the truth.<sup>34</sup> It follows therefore that, in the case of a discrepancy between a report and what is alleged by the accused, evidence must be taken in the ordinary way.<sup>35</sup>

Procedure by a Court of summary jurisdiction following a guilty plea came before Rettlefold J. in Dale v. Peterson.<sup>36</sup> There was a discrepancy, upon a plea of guilty, as to the circumstances of the offence. The accused appealed to the Supreme Court on the ground, inter alia, that the Magistrate

had resolved the conflict in favour of the prosecution without hearing sworn evidence. Nettlefold J. observed<sup>37</sup> that broadly there are two subjects on which the Court requires information before deciding upon the appropriate penalty. The first is the circumstances of the offence and the second is the background and personal circumstances of the offender. It was the latter that was relevant in the present case, but Nettlefold J. made no distinction. His Honour noted that injustice may be done to the offender if strict compliance with the rules of evidence were required on his personal background. Some of it may be difficult and expensive to obtain, with the result that it would not be laid before the Court in mitigation. Compliance with the ordinary rules of evidence was not therefore required. The Courts have recognised and confirmed that practice as being correct. In R. v. Campbell<sup>38</sup> the Court of Appeal in England said: -

"If the prisoner challenges any statement it is the duty of the Judge to inquire into it; if necessary he should adjourn the matter and if it is of sufficient importance he may require legal proof of it. Or he may ignore it and if he does so he should state that he is not taking it into consideration. If the prisoner does not challenge the statements the Court may take them into consideration and no injustice is likely to be done. Very often it is in the prisoner's interests that his antecedents be stated; if it is not so, that is not the fault of the police, but of the antecedents".

Nettlefold J. then cited a line of Australian authority to the same effect. The first was R. v. Murphy<sup>39</sup> before the Queensland Court of Criminal Appeal. There the prosecution made a statement as to the accused's character,

subsequent to conviction, but prior to sentence. The accused denied the aspersion, but the trial judge did not resolve the conflict by evidence. On appeal the Court of Criminal Appeal held: -

"In these circumstances the trial judge was not entitled to assume that the statements made by the police were correct and to act on them without their being proved by evidence. If the statements had been correct there could be no doubt that the sentence imposed by the trial judge would have been a completely justifiable sentence. But by reason of the fact that there was a dispute as to the character of the girl at the time the prisoner commenced his association with her, which was not resolved by evidence, I think that a case has been made out to allow an application for leave to appeal against sentence and set aside the sentence."

It is to be noted that at the time this case was decided the Queensland Criminal Code provided by s. 650 (inter alia) as follows: -

"The Court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the sentence proper to be passed".

In the opinion of Hottelfold J. that provision did not materially differ from Rule 42 (4) of the Justices Rules (Tas.).<sup>40</sup> Again, in the case of West v. Sprinkhuizen ex parte Sprinkhuizen,<sup>41</sup> the same principle was reiterated and applied. There the Supreme Court of Queensland said: -

"In the result it appears clear that when a person convicted of an offence disputes a material statement made by the police on the matter of sentence, the Court should exclude the content of that statement from



consideration unless it becomes substantiated by sworn evidence. In the present case the disputed statement was not so substantiated and in that event it should not have been taken into consideration on the question of punishment".

Other cases noted by Kettlefold J. were Jackson v. Kimber,<sup>42</sup> R. v. Veisey,<sup>43</sup> R. v. Maitland,<sup>44</sup> and Powell v. Webberley,<sup>45</sup> each to the same effect. In searching for a principle which would unify the propositions emerging from these cases His Honour concluded that the principle was that justice must manifestly be seen to be done. He said

"That principle is that justice must not only be done but must appear to be done. And it is trite that justice does not appear to have been done if a reasonable observer of those proceedings, behaving reasonably, might reasonably entertain a suspicion that an undue preference was shown for the unsworn contradictions of those assertions made by the other side."<sup>46</sup>

It is submitted that there is no reason why this should not apply equally to the evaluation of a probation report where it is disputed in some material particular. Indeed, personal material in regard to the accused's background was specifically in the learned judge's mind when he said<sup>47</sup> that one of the subjects upon which the Court may require information is in respect of the "background and personal circumstances of the offender". Such information is most usually provided by a pre-sentence report from a probation officer. Since the information provided is directed to the character, antecedents and personal circumstances of the offender, the report will have an important bearing on sentence. In the event of a dispute between the offender and the officer, it is submitted that resolution by

way of evidence is not only fair, but the only solution at the Court's disposal. It is not intended to imply that pre-sentence reports, or child welfare reports for the Children's Court, are often misleading, but there may well be cases where the whole of the background of a family or of an offender is difficult to discover. The report can only be as reliable as the original sources and if the offender is either not well-known locally, so that reliable local information cannot be found, or is unfavourably known, then this may have an unconscious expression in the assessment put to the Court. Not that one should be afraid to reveal the offender as anti-social, if such he is, but the risk of bias must always be minimised. Above all else, a report should, like any other evidence put before the Court by a professional person, be reliable. And like all such other evidence, it should be subjected to testing in the same manner. This provides a safeguard not only against patent unreliability, but also ensures that the contents of the report are reliable, where no controversy has been aroused. This, in addition to the obligation of the Court to reveal to the offender the contents of the report, should be an adequate safeguard to ensure that he will not be prejudiced by the presentation of unreliable information and, at the same time, ensure that his and the community's best interests are served by the imposition of an order that suits both.

#### DISCLOSURE OF REPORTS IN THE CHILDREN'S COURT

It is submitted, then, that the Court is legally obliged to reveal reports to the offender, or at least to his parents, as a necessary corollary of the judicial process. Whilst the legal issue may be simply resolved, the policy issue cannot. Traditional legal procedures must operate here to achieve the reform for which the legislation was established.

Safeguards of the criminal procedure apply no less because the first and paramount object of the Court is to reform the offender. These two concepts are difficult to apply concurrently in certain cases. For example, it may be that it is legally necessary to reveal to the child and his parents the contents of a social background report in strong deprecatory terms and placing much blame upon ineffective parenthood. Whether this is of any assistance in solving the problems that brought the offender before the Court is not clear. Disclosure of reports needs to be examined from two points of view.

It is necessary to examine the effect upon the officers who prepare them and the effect upon the child and family. In a sense, both are interwoven and cannot be separated for isolated consideration. There is no uniform solution. In the United States, in Alabama, California and Ohio, the accused or his Counsel, may inspect the report. The Federal rule, however, is that disclosure is within the discretion of the judge. Even in the case of the death penalty, due process has been said to have been exhausted at conviction and the accused has no right to see the report that may assist in sending him to the gas chamber.<sup>48</sup> In England s. 43 of the Criminal Justice Act 1948 requires that the probation officer's report be disclosed to offenders, but that Act does not apply to the Juvenile Court and the Children and Young Persons Act 1969 contains no equivalent provision. The child welfare legislation of the Australian States does not specify, in express terms, the procedure to be followed by the Court in the disclosure of background information. In Tasmania, it does seem clear, as has already been suggested, that the report must be disclosed. In the United States the Model Penal Code provides a compromise between disclosure and complete secrecy. Section 7.07 (5) provides that the Court should reveal to the

offender or his Counsel the factual contents and the conclusions of the report so that he may comment or challenge it as necessary.

What makes the issue such a difficult one is that full disclosure may have a deleterious effect upon the juvenile and thus any attempt to assist him would be met with resistance and resentment which would defeat the whole exercise. If reports are to be fully revealed, then reporting agencies may also encounter difficulties. From American studies<sup>49</sup> it was concluded that probation authorities were of the opinion that all information should be kept confidential. One of the reasons advanced was that disclosure in Court would interfere with the casework process. Probably the most serious effect might be that the offender would resent both the informant and the officer. Hence, a good worker-client relationship would be impossible. There may be some force in this argument where the investigating officer is the one who is deputed to carry out the supervision. This, in fact, is the situation in many statutory agencies: although, where the investigation and supervision are carried out by different officers, the criticism could not apply with the same force.

Another point revealed by American studies was that if it were known that reports would be disclosed to the offender then sources of information would cease to co-operate. The result, of course, would be that reports would become incomplete and unbalanced, presenting only a partial view of the offender and in the end being more harmful than no report at all. One would expect that the professionalism of officers would go a good distance towards meeting this argument. It is submitted that it should not be beyond the ability of probation or child welfare officers, who often stand between the citizen and his liberty, to exercise sufficient skill and judgment to justify their reports. Where information is inadequate they should be trained to frame the report so that any shortcomings or deficiencies are

expressed. Even if that were so, there is little to be said about an offender where there are no sources of information. In these circumstances one must face the question as to whether sources of information would disappear if reports were revealed. Perhaps the problem might be phrased differently. If reports were to be revealed to offenders in open Court, then it is at least plausible to assume that the only information presented would be that which is reliable and properly authenticated. The prospect of disclosure would be a vehement reminder that speculation has no place when one occupies a position between a citizen and his liberty.

Results that may follow from a Court sentence may be wide ranging indeed. One need only glance at the range of penalties at the disposal of a Criminal Court. On the one hand there are the traditional retributive punishments such as fines, prison sentences, good behaviour bonds, with multifarious conditions, and probation, to mental hospital orders and compulsory psychiatric treatment on the other. Modern psychiatry may, as some claim, still be in its infancy, but the effect of its drugs and techniques on the personality can be little short of devastating. Responsibility upon those who have any hand in the treatment of criminals is therefore proportionately increased. A direct consequence of disclosure may then be a safeguard to ensure that only accurate and reliable material is presented. It therefore follows as a matter of course that the standard of reporting would improve. To present a report to a Court imposes a responsibility which should be accepted by child welfare and probation personnel to ensure that the document is completely authenticated and reliable. That is an incident of professionalism and ought to be regarded as such. From this aspect it therefore seems that the case for disclosure is strong. But that is not the only consideration.

In a Children's Court the problem is often more family orientated than in the adult Courts. If problems have brought the child before the Court, it may, as previously mentioned, be the result of the family situation, or it may be that the offender has difficulty in relating to his outside environment. Whatever it is, finally it is the parents and sometimes other members of the family who must make some effort to help. There may be no doubt that it is just, in a legal sense, that reports should be disclosed. But if that means that the child and his parents are to be told that they are all well-known to the Court, the police and the Welfare Department as aggressive and anti-social and the boys have served several periods of imprisonment together with comments to the effect that nothing can be achieved with the family, the result of disclosure may not be just either. This, it is seen, is more particularly a problem for a Children's Court than an adult Court. Even in the case where the child has good relations with his parents, who in turn believe they are conscientious and make every effort to be such, a great deal of harm may be done, for example, by disclosure that the school regards the child with suspicion. In the case of psychiatric reports, the danger is even more pronounced unless the situation is carefully and skilfully explained. There is nothing to be gained by destroying the self-respect of a child offender and his parents. If they are to be reformed, self-respect must be maintained.

To be effective, any proposal by a Children's Court to assist in reform must be carried out in co-operation by an agency outside the Court. Responsibility for executing the programme falls to the Social Welfare Department, the body responsible for the preparation of the report. Where disclosure meets with a hostile reaction, the possibility of forming a meaningful casework relationship is made more remote. The Department is a

body independent, of, and separate from, the Court. Yet in the mind of the child it and its officers identify with the Court and with what the Court represents in the public mind. In the mind of the family the Court exists to punish bad behaviour and the child welfare authorities are charged only with carrying out the Court's bidding and, thus, a dilemma exists. Nowadays, a Children's Court is concerned with welfare and reform. It is not concerned with punishment in the old sense of the term. To achieve this objective, attitudes adopted by both the bench and the social worker are important. Once the impression of punishment and vindictiveness is created in the mind of child defendants and their parents, it is no use to explain that the object is to help and not to punish. Everything depends upon the ability of the social worker to create a satisfactory working relationship between the child, his parents and himself.

Here the relationship is a social casework one, based upon mutual trust and confidence and ideally should be voluntary. Based upon a sympathetic understanding of the child, authority and force have no place if a social work programme is to be effective. It is this rather delicate relationship which must be considered in the disclosure of reports in a Children's Court. Information, which may be important to a full appreciation of the child's conduct, may be given by parents in confidence. It may be, for example, that the child is adopted and is unaware of it. If this should be blurted out in open Court by the Magistrate or welfare officer, in the presence of the child, there is every reason to expect the parents to be resentful. If information gained in the external investigation in the community contains inflammatory material which the family may wish to keep confidential, again, resentment may arise. When this resentment takes the form of aggression towards the officer and a general hostility towards the Court and the

programmes, the foundation for the future rehabilitation of the offender is eroded or, at best, severely shaken. But it must not be over-looked that the revelation that may cause such an upset may not only be true and correct in every particular but may also be necessary for a full and comprehensive understanding of the child, thus enabling an intelligent and realistic appraisal of the manner in which he may best be assisted. Without this information the Court is unable to exercise a jurisdiction that may ultimately be beneficial. Unless it is able to do that, it fails to fulfil the purpose which is the intention of the legislation. At one and the same time the ultimate good becomes possible because the Court has a range of options and the background to use them realistically, and on the other hand, impossible, because it must act judicially and reveal all that is relevant.

Of course, it would not be in all cases that such dire results would follow disclosure. Where the report does not enter into controversial fields or where the parents agree with the contents and facts in full there would be no problem. As a general principle, however, the possibility of a disruption of relations between the family and the whole Children's Court system is too great to be ignored. Nor is it a service to the family concerned to condemn them in Court to their faces, even if the condemnatory remarks are true. The object is reform and rehabilitation, using social casework methods, and anything which detracts from that is contrary to the principle of the Children's Court legislation.

In these circumstances, the Court must balance the situation and take the course which is least harmful. It may be noted that there is no statute or rule of Court to govern child welfare reports and it would be a formidable task to create such a rule which would operate fairly in each case.



Individuality is the hallmark of the jurisdiction. For its goal to be successfully achieved, it is essential that the penalty should fit the child, and not the offence. The notion of the punishment fitting the crime has no place in the Children's Court, nor can it have, if its major objective is to be put into operation. They are two mutually exclusive positions.

There can be no doubt that in many cases Children's Court reports will contain information that should not be revealed at large. It would seem, however, that a compromise may be achieved in the form of some controlled disclosure. Where the Court wishes to discuss confidential material with parents or social workers there seems no reason why the child should not be excluded provided his parents are present. In fact, this practice is followed in the Hobart Children's Court on appropriate occasions. In this way there can be sufficient disclosure to satisfy the legal requirements without endangering the prospects of rehabilitation. A second solution might be the course adopted by the Model Penal Code (U.S.) where paragraph 7.07 provides that the factual contents of the report should be revealed, but not the report itself. The Model Penal Code was, of course, referring to probation officer's reports for adult offenders, but it is submitted it could be successfully adopted by a Children's Court. If Counsel is engaged the problem is not so perplexing. The same difficulty of revealing a report in full to Counsel does not arise in the same way as to the partly directly affected. The practice followed where Counsel is retained is to reveal the report to him in full so that he may have regard to it in his plea in mitigation.

An additional problem may also be presented by disclosure. As soon as a report is disclosed, the information becomes potentially more widely disseminated than would otherwise be, which, again, is contrary to the

policy of the legislation. Information may fall into the possession of police officers who happen to be present as witnesses or as prosecutors and ancillary staff such as clerks. All precautions should be taken to prevent such indiscriminating disclosure, not because the Court staff in general are untrustworthy, but because of the potentially wide distribution of recorded information. Perhaps the most effective method of disclosure is simply to hand the report to the parents or Counsel for perusal and then to return it to the Court. General disclosure to persons not properly interested should never be permitted. Here, another aspect of the confidentiality policy comes into operation: namely, the custody of reports after determination of the proceedings. It is trite to say that once information is reduced to writing and filed it is liable to be seen by persons who have no bona fide right of access. Disclosure means disclosure to the parties who are directly affected, namely the offender or his parents, as appropriate in each individual case. Disclosure to clerks, messengers and miscellaneous office staff is not envisaged. As the information may be misused, the Department having custody of reports should take every precaution against wrongful disclosure and accidental access. Of particular importance in this context are psychiatric reports. These may not be fully comprehended and the uninitiated may draw false conclusions capable of doing great harm if used inexpertly or malafide. It is not that the Magistrates and child welfare officers are suspected of misuse of confidential background information, but that once a file is set up it is liable to be seen by persons who fail to appreciate its significance. Information may be carelessly spread. On the other hand, it may be illicitly sought by those who have guilty intentions and who consciously intend to misuse it for personal reasons. Trafficking in personal information nowadays presents one of the greatest menaces to privacy.

SUMMARY

It is a natural incident of the policy of treating juvenile offenders that the Court must be seised of sufficient background information about the child to have a proper appreciation of his needs. Without this, the Court cannot make the penalty fit the offender rather than the crime. To enable the Court to have this information at its disposal, the offending child and his parents are visited by a child welfare officer who will submit a full social background report to the Court. He will not only interview all relevant family members, but also anyone in the local community who is likely to have anything of value to contribute. Such external sources will include the police and school, employers in appropriate cases, and any relevant local groups, such as the Parish Church. From this information, a social background report will be prepared for the Court. It will refer to the child as an individual and as a member of the local community. As a matter of necessity it will often contain much that is subjective, and for this reason there should be sufficient reference to sources so that the reliability of the report can be assessed. Such references are very rare, and the Court is often in the hands of the child welfare officer in evaluating the background of the offender. Most reports contain a recommendation, but the influence these may exert upon the Court is not clear. <sup>51</sup>

Children's Courts are Courts of summary jurisdiction, and are therefore bound to act judicially. By this requirement they must proceed to do justice, and it is submitted that in law, reports must be disclosed. There is, however, no direct authority upon the subject, and it is accordingly necessary to proceed by way of analogy where reports are prepared in similar circumstances. The most relevant comparisons are reports under the Matrimonial Causes Act 1959 and probation officers' reports in the adult Courts. Clearly these must be disclosed to the parties. The former because, under the Act, they

are received in evidence, and the latter because the Supreme Court has held disclosure to be essential if the Court is to act judicially. Not only must justice be done but it must manifestly be seen to be done. All material that is relevant to sentence must, therefore, be disclosed. This is relevant to the Children's Court, because it is a Court and must act judicially. If this is so, however, the Court must aim also at the welfare and rehabilitation of the child, that being the reason for which a special Court was established in the first place. Care is necessary then in the mode of disclosure. In appropriate cases, the child may be excluded from the Court while confidential matter is discussed with parents and social workers. When this is done, it seems that parents must be present. Private discussions between child welfare officers and Magistrates are not consistent with the Court's duty to act judicially. Another solution is for the Court to disclose only the factual basis of the report so that all relevant material is disclosed, but at the same time comments that could be harmful are not published. The dilemma is that if the social work relationship between the child welfare officer and the family is disrupted it is not possible for a programme of reform and rehabilitation to be put into effect, with the result that the purpose of the jurisdiction is defeated.

Finally, great care should be taken in the custody of reports after the hearing to ensure that they do not fall into unauthorised hands, with resultant misuse of confidential material.

#### RECOMMENDATIONS IN CHILD WELFARE REPORTS

It has been noted that there is controversy on the subject of recommendations. In fact the practise in Tasmania is for reports to volunteer a recommendation as to the type of order most likely to be of assistance to the offender. The writer's impression as a former child welfare officer is

that the decision of the Court and the recommendation are, in a vast majority of cases, identical. However, it is not so simple that a personal judgment may be made without a full statistical investigation. A preliminary study was done in New South Wales using entries from the Probation Register for 1962/3<sup>52</sup>. Findings indicate that in such a study the variables of chronological age, type of offence and location of the Court would have to be controlled. No relationship was found between the length of probation finally ordered and the child's previous record or type of offence, except in cases of assault or malicious damage. Short periods of probation were more frequently given than longer ones, i.e. twelve months or less. Whilst metropolitan Courts tended to give shorter periods for adolescents almost of adult responsibility, it was found that country Courts tended to give more extended periods.

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CHAPTER 2 - NOTES

1. Child Welfare Act 1939 - 1956 (N.S.W.) s. 89 (2)  
Child Welfare Act 1958 (Vic.) s. 27 (1)  
Child Welfare Act 1947 - 1968 (W.A.) s. 25  
Children's Services Act 1965 (Q'ld.) s. 62 (1)  
Children and Young Persons Act 1969 (U.K.) s. 9
2. See p. 32 - 44, 73
3. U.S. Task Force Report Juvenile Delinquency and Youth Crime  
 Tappan: Crime Justice and Correction (1960) Ch. 3.  
 Burt: The Young Delinquent 1965 Ch. XIV  
 Stott: Delinquency and Human Nature (1950)
- 3A. Grunhut: Juvenile Offenders before the Courts (1956) p. 51, 120 et seq.
4. Burt: The Young Delinquent 9th impression 1965 Chs. 3 - 4.
5. Loc. cit p. 78.
6. Quoted in Chappel and Wilson (eds.): Australian Criminal Justice System (1972) p. 147.
7. For example see Bowlby: Child Care and the Growth of Love (1965)  
 at p. 36 - 42, 51 - 52, where it is cogently argued that a close and emotionally satisfactory relationship with the parents, particularly the mother, is essential for the development of a stable personality. Children who later became delinquent were found in his study to have had an infancy characterised by this defect.
8. See Burt: The Young Delinquent 9th impression 1965 p. 130 - 1  
 Kropka; Social Group Work: a helping process (1963) p. 243 - 4.
9. Pearlman: Social Casework (1957)
10. See Burt loc. cit. where home conditions and inter-personal relationships, together with school and environmental factors are fully discussed in relation to the development of delinquent behaviour.

11. See Note 7.
12. Published by the Carnegie United Kingdom Trust 1950. It was a study of 102 youths in an Approved School in the United Kingdom. The findings are succinctly summarised in Chapter XV.
13. Tappan: Crime Justice and Correction (1960) p. 556 - 7.
14. This general problem is admirably discussed from two different points of view in two articles in 6 Res Judicatae p. 224.  
C.S. Lewis: 'The Humanitarian Theory of Justice' which is answered immediately by  
Morris and Buckle: 'The Humanitarian Theory of Justice: A Reply to C.S. Lewis.'  
Lewis takes the view that this type of theory puts the individual at the uncontrolled disposal of experts who are responsible to themselves only and not to the Court. On the other hand Morris and Buckle argue that by appropriate safeguards in the legislation experts can be made responsible to the Court and thereby kept on "tap and not on top".
15. In Tasmania the basic criterion is age. Offenders up to fourteen years go to Wybra Hall Home for Boys, and those above are sent to Ashloy Home for Boys. The other male institution is West Winds, for educationally retarded boys, usually below fourteen years. Female offenders must be sent to Weerona Girls Training Centre or to Magdalene Home. The latter is a private home operated by the Roman Catholic Church, and the offender must comply with the admission requirements for the home before she will be accepted. The private institutions are described in Chapter 3. Age is the first consideration, and superimposed upon this are the various requirements of the institution and the kind of child for whom it is geared to accept.

16. Watson: The Child and the Magistrate (1965)

See also the Report of the Departmental Committee on the Probation Service 1962 Cmd 1050 (the Morison Committee) which recommended that probation officer's recommendations should be limited to the offenders likely response to probation. The role of the officer was seen in broader terms by the Streetfield Committee (1961 Cmd 1289). They recommended that ultimately probation officers would give recommendations on all forms of sentencing.

17. Child Welfare Act 1939 - 1956 (N.S.W.) s. 89

Children's Court Act 1958 (Vic.) s. 27

Child Welfare Act 1947 - 1968 (W.A.) s. 25

Children's Services Act 1965 (Q'ld.) s. 62 (1) (a), s. 145 (2)

18. p. 3

19. 1848 2 De G. & Sm 457

20. 1893 2 Q.B. 232

21. 1893 2 Q.B. 242

22. 1963 3 Ch. 381

23. Unreported Judgments Serial No. 64/1972

24. R. v. Bodman Justices: Ex parte McEwan 1947 1 All E.R. 109

25. R. v. Barry Justices Ex parte Kashim 1953 2 All E.R. 1005

26. 1961 V.R. 89, 91

27. (1961) 2 F.L.R. 280, 283

28. See Reeves v. Reeves (1961) 2 F. L. R. 280, 284

29. (1967) 10 F. L. R. 219

30. (1963) 9 F. L. R. 384, 408 - 9.

31. Unreported 30/1964

32. Unreported 23/1972



33. Unreported 23/1972 p. 4.
34. Powell v. Webberley 1963 Tas. S. R. 62  
Dale v. Peterson 64/1972
35. R. v. Campbell (1910 - 11) 6 Cr. App. R. 131, 132.  
R. v. Marquis (1951) 35 Cr. App. R. 33, 35 - 36.  
R. v. Recorder of Grimsby 1951 2 All E. R. 089.  
Jackson v. Kimber 1934 S. A. S. R. 315
36. Unreported Judgment 64/1972
37. 64/1972 at p. 7
38. (1910 - 1911) 6 Cr. App. R. 131, 132
39. 1946 - 47 Q.W.R. 4
40. Supra p. 10.
41. 1961 Q'ld R. 313
42. 1934 S. A. S. R. 315
43. 1962 S. A. S. R. 127
44. 1963 S. A. S. R. 332
45. 1963 Tas. S. R. 62
46. Supra p. 12
47. Supra p. 7
48. Quoted in Tappan Supra p. 557.
49. See Tappan Supra. p. 558 and the references there cited.
50. For a review of this general problem see Storey:  
 'Infringement of Privacy and its Remedies' (1973) 47 A. L. J. 498.
51. See Chappell and Wilson (eds.) Supra p. 99 for a preliminary study  
 made for the Courts in New South Wales by J. Kraus. For an English  
 study see Peter Ford: 'Advising Sentencers, a Study of  
 Recommendations made by Probation Officers to the Courts' (1972).
52. See Note 51 above.

CHAPTER 3HOW CHILDREN'S COURT ORDERS ARE PUT INTO EFFECT

The legislation applicable to the Children's Court provides a number of ways by which the legislative policy may be carried into effect. There is legislative provision for simple discharge and, in this event, no conviction is to be recorded unless the Court orders to the contrary. The defendant may be placed under a probation order if he is at least fifteen years of age with or without a condition that he be placed under the supervision of a probation officer. Fines and prison sentences may be imposed if appropriate. The most important provisions are that the offender may be placed under the supervision of the Director of Social Welfare or for his declaration as a ward of the State. In recognition of the drastic nature of the latter step, s. 24 of the Child Welfare Act makes provision for a remand for observation for up to three months before disposal of a delinquency case and s. 39 for an interim order of like duration for neglect cases. The Supreme Court has no jurisdiction to place a child under a probation order unless it also records a conviction.

PROBATION OF OFFENDERS ACT 1973 (TAS)

Section 22 (1) of the Child Welfare Act makes the procedure enacted by the Probation of Offenders Act 1973 applicable to the Children's Court if the child has reached fifteen years of age. This latter Act confers jurisdiction on Courts of summary jurisdiction to discharge an offender, where the charge is proved, without proceeding to a conviction. This power is exercisable where the Court is of the opinion that having regard to -

"(a) the character, antecedents, age, health or mental condition of the person charged.

(b) the trivial nature of the offence, or

(c) the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, may make an order ...." The Court may simply dismiss the complaint, or make an order discharging the offender conditionally under a probation order for a specified period not exceeding three years. Under s. 6 (2) (b) of the Probation of Offenders Act the Court may impose, as a condition of the order, that the offender be under the supervision of a probation officer. To secure the success of the probation, such other conditions as the Court think fit may also be incorporated. An order under this Act is more suitable for older children and s. 6 (2) (d) contains provisions concerning the treatment of such cases. It is expressly provided that the order placing the offender under probation may contain conditions as to his residence, abstention from alcohol and any other similar matters which the Court may consider necessary to prevent a repetition of the same offence or the commission of others. An order under this section is known as a probation order and, as the name implies, the supervision is carried out by a probation officer who, is an officer of the Probation and Parole Service of the Tasmanian Attorney-General's Department. This power may be exercised notwithstanding that the offender may reach the age of seventeen years during the currency of the order. Section 22 (2) of the Child Welfare Act confers power upon the Children's Court to deal with an offender so treated at any time during the currency of the order.

In addition to the powers already mentioned, the Court may simply place the offender under a probation order that he should be of good behaviour for a specified period up to three years and to come before the Court for conviction and sentence or sentence only if called upon to do so. This is

the equivalent of the order previously known popularly as a good behaviour bond under the Probation of Offenders Act 1934. Under s. 3 (1) (b) of the Probation of Offenders Act 1934 the Court could require sureties but that is not so under the 1973 Act. Under the old Act the sureties could be called upon to pay the amount of the bond if the offender defaulted. Such a possibility could conceivably ensure active supervision of a youthful offender.

A power similar to that which was conferred by the Probation of Offenders Act 1934 is also conferred by the Child Welfare Act. Section 23 (1) provides as follows :-

"A Children's Court, or any other court of summary jurisdiction, by which a child is found guilty of an offence, in addition to any powers exercisable by it, has power: -

- (1) to make an order discharging the child conditionally on his entering into a recognizance for a nominal sum, with sureties, approved by the Court, in such sum as the Court thinks proper, to be of good behaviour for such period not exceeding 12 months as may be specified in the order, and for the purpose of being further dealt with, to appear before a Children's Court or some other Court of summary jurisdiction when called upon at any time during the period."

This differs in some important respects from that in the Probation of Offenders Act 1934. First, there is no jurisdiction for the Court to dispense with sureties. In fact, under the latter Act, there must be sureties and they must be approved by the Court. It would be envisaged that, as this power may be applied to any child of what ever age, persons required to become sureties would be the ones responsible for his immediate care and supervision, i.e. parents or guardians. Second, the amount required by way of surety may be a nominal sum only. This provision may be compared with s. 3 of the Probation of Offenders Act 1934 which gives the Court

the discretion in fixing the surety. There is no definition in the Act of what is meant by a nominal sum and, in the absence of case law, one can only guess at its meaning. If the purpose of the section is to secure more effective supervision, it seems self-defeating to limit the surety to a nominal sum. Parents and guardians who so neglect the supervision of their children as to require such an order probably would not be reformed by the prospect of the loss of a nominal sum. An order of this nature, it is submitted, would be helpful only where otherwise satisfactory parents have simply neglected to provide adequate supervision. Lack of care and control brought about by social inadequacy or the disturbed behaviour of a child would not be assisted by a recognizance. It is submitted, therefore, that there is a case for the repeal of the nominal sum provision so that the amount of the recognizance is within the discretion of the Court. The third distinction is that the period of the recognizance may not exceed twelve months, whereas, the period under the Probation of Offenders Act 1934 was three years. Finally, in the event of a breach of the recognizance, the defendant may be called before a Children's Court or a Court of summary jurisdiction. Under the former power he could be called upon to appear before the Court for conviction and sentence. The power conferred by the Child Welfare Act is simply that he shall appear before the Court. Presumably, the Court may then proceed as it could have done when it first directed the recognizance. It still does not follow that on the breach of a recognizance a conviction will be recorded automatically. For that a special order under s. 20 of the Child Welfare Act is necessary.

Although the jurisdiction of the Supreme Court in matters involving children is wide, there is an important limitation on its jurisdiction to release an offender on probation. The power to impose a probation order without first convicting the defendant is a power conferred upon Courts of

summary jurisdiction only. Section 23 (1) of the Child Welfare Act is limited in express terms to "a Children's Court, or any other Court of summary jurisdiction". Section 7 (1) of the Probation of Offenders Act 1973 is similarly restricted to "a Court of summary jurisdiction". The only power of the Supreme Court to make a probation order is that contained in s. 7 (2) of the Probation of Offenders Act 1973: -

"Where a person has been convicted on indictment, or under the provisions of s. 63 of the Justices Act 1959, of an offence punishable with imprisonment and the Court is of the opinion that, having regard to -

- (a) the character, antecedents, age, health, or mental condition of the defendant;
- (b) the trivial nature of the offence; or
- (c) the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment, or that it is expedient to release the offender on probation, the Court, in lieu of imposing a sentence of fine or imprisonment, may make a probation order against the defendant which will provide that the defendant appear for sentence as provided in paragraph (a) of subsection (2) of section 6."

Whilst the power is in substantially similar terms as the corresponding power vested in courts of summary jurisdiction there is an important distinction. Under s. 7 (1) there is express provision that the Court may make a probation order without proceeding to conviction. There is no such provision under s. 7 (2), and the effect, it is submitted, is that the Supreme Court must record a conviction before it may make a probation order.

The power to discharge unconditionally without proceeding to conviction is one which is used extensively by the Children's Court. This is the

statutory warrant for the order commonly referred to as admonish and discharge, which is the most usual way of dealing with first and trivial offenders. Exceptions to this usual practice are where the child welfare officer's report expresses doubts about the offender's background or suggests that he may be in need of welfare counselling. As a general principle, however, it is the usual method of disposing of less serious matters.

Legally, convictions should not be recorded, in accord with the provisions of s. 20 of the Child Welfare Act, unless the Court so directs. Difficulty is found in imputing any practical significance to this provision as s. 20 (2) provides that a reference in any enactment to a conviction or to a person having been convicted shall be construed, in the case of a child, as including a finding of guilt, or a person found guilty of an offence. Hence realistically a finding of guilt for many purposes will be the same as a conviction. Although, it is at least arguable that ss. (2) should be confined to its literal terms for it commences with the phrase, "A reference in any enactment to a person...", and, thus, Children's Court findings of guilt should be construed only for the purpose of some other enactment which refers to convictions. On this view, findings of guilt in the Children's Court would be for this limited purpose only and would still leave the child offender free of a criminal record. In practice, though, it is common for convictions in the Children's Court to be listed by the police on the offender's record and then produced to an adult Court subsequently upon the question of sentence if the occasion necessitates. Indeed, prior findings of guilt are usually produced in subsequent proceedings before the Children's Court. Difficulty is experienced in finding reasons for denying the Court information of this nature where it exists and is relevant to sentence. But if that is so, it is difficult to impute any logical meaning to s. 20.

As already mentioned, the Children's Court may exercise the jurisdiction granted to Courts of summary jurisdiction by the Probation of Offenders Act 1973 to place the child on a probation order under the supervision of a probation officer. Duties of probation officers are spelt out with some particularity by s. 4 (2) of the Act. Namely: -

- (a) To visit or receive reports from the person under probation
- (b) To ensure that the probationer observes the conditions of the order
- (c) Advise, assist and befriend the probationer, and to endeavour to find suitable employment, and
- (d) Any such other duties as the Court may direct.

As such, two aims are fulfilled. First, there is a positive statutory duty on the officer to assist the offender. To this end, the officer must advise, assist and befriend his probationer. The other aim is more of an enforcement function, viz. to ensure that the conditions of the probation order are observed.

#### FINES AND PRISON SENTENCES

Fines and prison sentences are available to the Children's Court but their use is limited by s. 21 of the Act. Neither a Children's Court, nor any other Court of summary jurisdiction, may impose a term of imprisonment upon a child for any offence unless he has attained the age of sixteen years. Where the child has attained that age, he may be sentenced to prison for a period not in excess of twelve months. Fines, too, are restricted. A Children's Court shall not order a child under the age of fourteen to pay a fine of more than \$20.00. Insofar as any statute requires the imposition of minimum fines and periods of imprisonment, they do not apply to children found guilty of relevant offences. Where a child is found guilty of an



offence which, if committed by an adult, would be punishable by a prison sentence without the option of a fine, then the Court may adopt one of two courses of action. If the child is younger than fourteen, it may impose a fine of not more than \$20.00 or, if he has attained that age, then a penalty not in excess of \$100.00. If the Court follows the latter alternative, the penalty shall not exceed the sum that, if it had been imposed on an adult who defaulted in payment would subject him to a greater term of imprisonment than that to which he would have been liable if he had been imprisoned in the first instance. These restrictions, however, do not affect the power of the Court to order the payment of the sum by way of damages or costs. They are also without prejudice to any other powers exercisable by the Court. That means that the Court may still use the additional powers given it under the Child Welfare Act to place a child under supervision or declare him a ward of the State. These powers will not be further considered because they do not form part of the welfare programme that is initiated by appearance before the Children's Court.

#### SUPERVISION ORDERS

The power most commonly used by the Children's Court to ensure the supervision of a child, or to enable the provision of child welfare counselling, is the power under s. 23 (1) (b) of the Child Welfare Act, namely to make a supervision order. That order requires the person in respect of whom it is made to be under the supervision of a child welfare officer or probation officer as determined by the Director of Social Welfare. Section 36 (1) of the Act gives the Court jurisdiction to impose conditions as part of the order and it is the duty of the supervising officer to ensure that any such conditions are observed. Where there is a breach of a condition or a failure to obey instructions of the supervising officer, the child may be charged with a breach of supervision. In these circumstances, the Director may make an application to the Court and, if the Court is satisfied as to

the alleged failure, it may then vary the supervision order or make any order it could have made instead of the supervision order. The only qualification to this enactment is that the Court cannot impose a penalty or require the payment of any damages or costs. A similar application may also be made where the child is living in conditions which are unsatisfactory.

This latter provision is useful for neglected children who are often placed under supervision so that the Social Welfare Department has the status to provide social casework assistance to the family, rather than break family bonds by placing the children in residential care. If conditions in the home do not improve in response to these measures and the social and physical well-being of the children suffers from exposure to appalling sub-cultural conditions, then the proviso may be used as a ground for intervention by the Court. Where such a course is necessary, children are usually declared wards of the State.

In these respects, then, the purpose of supervision orders is two-fold. They are used to provide social casework assistance and disciplined supervision of juvenile delinquents. To assist such children in their own homes and environments in this manner is the juvenile equivalent of a probation order for an adult. The programme is orientated, first, towards the adjustment of the child away from delinquent tendencies. In the second place, it is used for the children who are the victims of neglect where it is not necessary that the child has offended. Any supervision order that the Court may impose is in respect of the children, but the purpose is to give the welfare authorities the status to carry out rehabilitative work. Although where the case is one of neglect, the programme is family-orientated, and the most extensive work is with the parents. The object is to enable the family to function adequately as a unit and to help the parents to provide proper care and control.

It is to be noted that s. 36 of the Act provides that a supervision order may not exceed three years in duration and automatically ceases to have effect when the child either becomes a ward of the State or reaches the age of eighteen.

#### DECLARATION AS A WARD OF THE STATE

Under s. 23 (1) (c) of the Child Welfare Act the Court may declare a child a ward of the State. The effect of this measure is to remove guardianship from the parents and vest it in the Director of Social Welfare. The Director then becomes the legal guardian of the child to the exclusion of everyone else.

A child who becomes a ward remains so until he reaches the age of eighteen, when the wardship automatically ceases. The order once made is irrevocable by the Court and the child has no recourse, other than the normal appeal rights, to the Supreme Court for any judicial review of his status. Whilst there is no judicial machinery for discharge as a ward there is such a discretion in the Minister. Under s. 45 (2) the Minister may, if he considers it in the interests of the welfare of the child, order that he cease to be a ward. Any discharge pursuant to this section is purely discretionary and the only consideration is the child's welfare. As with all similar administrative discretions, it must be exercised judicially and in accordance with the rules of natural justice. In practice it is exercised according to the recommendation of the Director. There is no machinery whereby the parents may be heard by the Minister. The only material he is likely to have will be any report presented by the Director.

The persons likely to be affected by this section are usually inarticulate and incapable of expressing a case upon which the Minister could act. When it is remembered that declaration as a ward may occur at a very early

age, seven years in the case of an offence<sup>1</sup> and at any time prior in a case of neglect, the term of the sentence can be long. Admittedly, a child of seven would in all probability not be so declared, but at the age of ten or twelve his delinquency record may well justify such a course. Its effect will be that the child will be subjected to a Court order of six to eight years duration. Where children come into Court because of neglect, they may be subject to the guardianship of the Director for up to eighteen years depending upon the age at which they come into care. During this time both classes of children are subject to the administrative fetter of the Director or perhaps more realistically, the rules and established procedure of a public service department. Such rules and procedures may not be the best for each individual case so that it may be that the so called programme organised by the department will be no more effective than the care provided by the parents. As a matter of practical reality, the manner in which a child is dealt with depends upon the recommendation of a variety of officers, the officer who has the most direct contact making the most influential recommendation. If a ward is in an institution it is really the recommendation of the superintendant as to the suitability of the child and of the child welfare officer as to the suitability of the home that determines whether he returns home or is placed in an alternative placement, such as with a relative, or simply stays in care. Where a child is in care because of neglect, his future if he is in an institution, is determined in the same way. If however, he is in a foster home the process is more autocratic, in that the only person who has any direct contact with him is the child welfare officer, and it is therefore his recommendation alone that shapes the future. In no other way could a large public service welfare agency operate. All legal responsibility is by statute vested in the Director, but it is impossible for him alone to exercise that responsibility

individually for each ward under his care. It is in the chain of recommendations that the danger lies. Not only may certain children become submerged in the establishment but subtle factors may sway the recommendations of those officers in a position to exercise influence. In other cases, there may be complete and objective good faith, but devastating errors of judgment.

Because of this hazard there is a serious defect in the legislation in not providing some method of review by the Court in respect of children subject to programmes as wards of the State. A judicial appeal would provide a safeguard against a wrong exercise of discretion and, at the same time, act as an independent assessment of a programme which may be of dubious value. Such a procedure would be beneficial both to the aggrieved child and to the Department.

There are some cases where a child attains the age of eighteen and has no parents or other guardians capable of providing proper care. The Minister there has power under s. 45 (3) to extend guardianship until the child attains age of twenty-one.

Under s. 46 the Director is given power to deal with wards in several ways. He may provide for the care and maintenance of a ward by: -

- (a) boarding him out with a suitable person;
- (b) place him in an institution; and
- (c) apprenticing him to, or placing him in the employment of, a suitable person.

In addition to these measures, he may place the child under the control of his parents, relatives, or friends, or other suitable persons, if such would be in the interests of the welfare of the ward. As already mentioned, it is a matter of administrative discretion having regard to the child's welfare.

Once a child is legally in the care and control of the Director, he may not be removed from it. The authority of the Director is reinforced by s. 47 which provides for criminal penalties of a fine of two hundred dollars or six months imprisonment and one hundred dollars and six months imprisonment for a person who ill-treats a ward in his care or removes him out of the State without the consent of the Minister, respectively. On the other hand, a ward who absconds may be apprehended without a warrant and placed in a more secure situation. Any person who assists an absconder is liable to a penalty of one hundred dollars or six months imprisonment. By s. 47 (4) the Director has the duty to cause each ward who has been boarded out to be visited by an authorized officer to ensure that he is being properly cared for and that any terms and conditions of the placement which may have been imposed are observed. Sub-section 5 requires the person with whom the ward has been placed to produce him and his clothing. The accommodation provided is also to be inspected and the ward examined and questioned in private. For any default on the part of such persons the Act imposes a penalty of fifty dollars. The person with whom a ward is placed is required by s. 47 (7) of the Act to give the Director notice of any change of address and if the ward absconds, becomes ill, is injured or dies the Director must be notified. Again, there is a penalty of \$50.00 provided for default. An authorized person may not keep a ward after being requested by the Director to surrender him, the penalty being a fine of \$100.00 or six months imprisonment.

As in many other areas of social welfare, the Director depends heavily upon those institutions conducted by private charities. These institutions cater mostly for victims of neglect but they do accept, in suitable cases, children who are placed in care by the Court because of their delinquent behaviour. By s. 48 of the Act, wards in the care of private institutions

may not be removed or placed in employment by the Director unless he consults with, and takes into consideration the views of, the managers of the relevant home. Any wages which are due to wards, are under s. 49, payable to the Director or another person approved by him, unless some other arrangement is permitted. The money so collected shall be deposited in a Bank savings account to vest in the ward at majority. It is most usual, apparently, to allow the ward to collect his own wages but he may be required to pay a fixed amount into a trust account, which will be released to him either by the Director's consent, or when he reaches majority. Section 50 provides that where a ward is entitled to any property, or has any property vested in him, the Minister may appoint the Public Trustee as the trustee of the property.

These are the options accorded the Director under the legislation and, as already mentioned, it is beyond the power of the Court to exercise any control over the future of the child once he has been declared a ward. Responsibility for the future care and control is wholly within the administrative discretion of the Director, acting upon the reports of departmental officers. Any decision to discharge wardship is the prerogative of the Minister. Again, this prerogative is exercised upon the reports of the departmental officers. To this there is, however, one exception. By an amendment to the Child Welfare Act in 1963 Children's Courts and the Supreme Court were given power to make an order committing the defendant to an institution at the same time as declaring him a ward.<sup>2</sup> The effect of such a committal order is that the child must be committed to an institution which is selected by the Director. He may leave the institution only with the consent of the Director and, then, only for such period as that allowed in the consent. A committal order ceases to have effect when the child ceases to be a ward and it may be discharged by the Minister. The power of the Minister to discharge a committal order is discretionary and must only

be exercised after the consideration of a report from the Director and must be exercised having regard to the welfare of the ward and the public interest.

Apart from this provision, a child in respect of whom a committal order has been made is dealt with in the same way as any other ward who comes into care as a result of his delinquent behaviour.

#### LEGISLATIVE PROVISION FOR INTERIM MEASURES.

In some cases the Court will require further information, or a period of assessment, before arriving at a decision, a situation which is provided for by s. 24 (1) of the Act: -

"Where a child has been found guilty of an offence by a Children's Court or any other Court of summary jurisdiction, the Court may remand him for further information to be obtained with respect to him or for him to be kept under observation in order that the Court that finally deals with him should be better informed as to the manner in which he should be dealt with, and where a child is so remanded he shall be committed to custody in charge of the Director."

Sub-section (5) provides that the maximum period of any such remand shall be three months.

Children so remanded may be placed in any of the manners available to the Director in respect of wards. The provision is used for assessment purposes in order to determine which kind of programme would be most suitable for the offender. Any necessary medical or psychiatric examinations will usually be carried out during this remand period and all relevant reports will be made available to the Court for its final disposal. It is to be noted that s. 24 is confined to children found guilty of offences and



does not apply in cases of neglect or to the breach of supervision orders. For these latter cases, s. 39 makes a virtually similar provision, where the limit is also three months. The only distinction between ss 24 and 39 is that under s. 24 the Court may require further information and observation. There is no similar provision under s. 39. An order under the latter section may be made where the Court is not in a position to decide what order should be made on a neglect charge or a breach of supervision. Whilst the Court is not authorized in express terms to seek further information such intention would seem to be implicit in the provision.

Cases where proceedings involving neglect are instituted are those where intensive social case-work is most likely to be in progress. The period allowed by the section enables an assessment as to whether the family will respond. If a positive result is achieved then an order removing the children from home is not necessary. On the other hand, if it becomes obvious that the standard of care in the family will remain inadequate, then some form of legal intervention will be unavoidable. The options the Court has in neglect cases are declaration of wardship or the imposition of supervision orders<sup>3</sup> whilst for breaches of supervision it may make any order it could have made when the initial order was made<sup>4</sup>. Whether the child is remanded under s. 24 or is subject to an interim order under s. 39 the effect will be that the Court must obtain further information and, in the light of all relevant information, make an order finally disposing of the case.

#### THE SOCIAL WORK NATURE OF THE PROCEDURE.

The essential notion of Children's Court orders is that of helping the child to a better adjustment, as opposed to the idea of punishment. The core of the process is the personal social work relationship between the

child's supervisor and the child and the family.

"Whilst emphasis and methods may have changed the recognition of the importance of feeling, the basis of acceptance, disinterested friendship and support, has remained. It has been reinforced rather than shaken by the powerful influences of psychological and psychoanalytical theory and by the analysis of casework methods. Much of that analysis, indeed, has been devoted to study of its conscious development and its varied uses in treatment. The Morison Committee defined casework as the 'creation and utilization, for the benefit of an individual who needs help with personal problems, of the relationship between himself and a trained social worker'. The more difficult and demanding the work of the probation officer becomes, the more persistently criminal or socially isolated the offenders they try to help, the harder it becomes to establish such relationships, yet the more vital such relationships are if any change is to be achieved."<sup>5</sup>

This statement commented upon the role of the probation officer in England but is equally applicable to the role of a child welfare officer under the Child Welfare Act (Tas). Whether the child be under a supervision order, on remand or is a ward of the State, the process is still the same. The essential objective must be his welfare and rehabilitation.

#### (1) SUPERVISION ORDERS

The first step which is involved in the operation of supervision orders is that the child will be taken on to the caseload of the appropriate child welfare officer. In children's cases the work tends to be orientated more towards the family than, perhaps would be the case with an adult offender. To say, though, that the officer's task is socially and personally orientated is not to say that the ultimate legal backing of the order is to be disregarded.

Indeed, it is the legal authority of the officer that makes both the initial contact and relationship possible at all. It is also the legal sanction which gives meaning to any conditions or injunctions laid down by the officer for the guidance of the child, especially where he has left home and commenced employment or is unemployed. Thus realistic limits are imposed. The client must, in any event, conform to certain standards of behaviour if he is to remain out of trouble with the law. Having imposed these standards as conditions of the order, it is for the officer to help both the child and family maintain them. There is an ultimate sanction, but the hope is that the active participation of the child may be obtained. Only when that is so may it be said that the supervision has been successful.

Child welfare officers must often work in co-operation with other officers and agencies having interests in the same case. For example, psychiatric treatment may have been ordered as a condition of the supervision order which brings another powerful influence into the rehabilitation process. Little can be achieved unless there is adequate understanding and co-operation between those responsible for the supervision and the psychiatric or other specialist team. Also important in the adjustment of a delinquent is the attitude of his school teachers. Their aid and co-operation must also be secured. All too often, children who come before the Courts are also under the adverse notice of the school for misconduct. As this is a most sensitive and important area little can be achieved if bad relationships at school drive the child into truancy and possible further delinquency.

To find solutions to all the problems that beset the offender is not the true role of the officer. His function is to help the child find his own answers which must be satisfactory to both himself and the community. He must be encouraged to lead an honest and industrious life and it is the role of the officer to stimulate the child and his parents to want such a life

for himself and themselves. Three fundamental principles, it has been said, are basic to social work.<sup>6</sup> They are, first, the fundamental respect for the intrinsic worth of each individual, quite apart from his talents or worth to the community, or the apparent lack thereof. Second, a belief in the possibility of change in the client and the conditions surrounding him and, third, an appreciation of the power of emotion. Logically then, a client of a statutory child welfare agency should not be looked upon as merely one of a category, as a delinquent, a psychopath or neurotic. That does not mean that the officer must accept the behaviour and attitudes of the child. It merely means that the child is accepted as a person and with a social work relationship it is hoped that a better adjustment may be assisted in the future.

Acceptance of all offenders is a difficult task. Certain types of offences and offenders evoke feelings of hostility. The professionalism of the officer should enable him to recognise in himself any such feelings so that the process of assistance is not endangered by subtle emotional factors lying unrecognised. What is accepted, however, is not the attitudes and behaviour of the client, but his individual personality. There must be recognition of the widely differing ways of life in various parts of the community. Hence what is suitable and acceptable to one class of people will not be appropriate for others. Values which the officer personally holds to be important must not be superimposed upon his clients. So long as the clients attitudes do not bring him into conflict with the criminal law and are conducive to his becoming a well adjusted individual, his attitudes are no concern of the supervising officer. The fundamental moral values of the community must be accepted and the officer should assist his client to live within them. An important part of the social worker's function is to assist the client understand these moral values and the way in which

they affect him so that he may make his own decisions based on them.

This is the basic social work framework in which supervision orders are put into effect. Modern research has shown that it is undesirable to break-up families, unless as a last resort after all else has failed. The same applies to the removal of children from home to delinquent institutions and this is what is meant when it is said that the intention of a supervision order is remedial as opposed to punitive. Although there may be single instances where the Court and the welfare authorities are at cross purposes in the purpose to be served by supervision. Even at the present time the Court, in arriving at a decision as to sentence, must have regard not only to the individual needs of the offender, but also of the public interest and the supposed need to deter others from offending. Having regard to these two latter criteria, the Court may be impelled to impose a supervision order where it is not warranted, merely as a means of punishing the offender or deterring others. In such a case the Court and the welfare concept come into conflict. Whatever the intention of the Court in making the order, the intention in putting it into effect is therapeutic. For that reason, supervision orders should be made only in appropriate cases. If punishment alone is appropriate in certain cases, supervision orders should not be made to serve the purpose and some other form of order should be devised. Under the legislation as it exists at the moment, punitive orders are limited to fines and recognizances where the child has attained the appropriate age. It is possible, however, for young children to be ordered to pay such costs and damages as are ordered by the Court. An order such as this, so long as the amount is such that it may be met by the child from his pocket money, would be preferable to the imposition of a supervision order where it is inappropriate.

For these reasons also it is important that supervision orders should

be made only where a report from the agency so recommends. The judgment a Court may form in a short time and in a strained and artificial atmosphere is no substitute for that of a social worker who sees the child and family in more relaxed conditions in their natural surroundings. In addition, it is the officer who has the benefit of first hand contact with such community bodies as schools, police and youth organizations.

If, having regard to these criteria, supervision fails, then other methods must be invoked. But this question immediately raises the issue of what the criteria for judging success or failure of a supervision order may be. On the one hand, it may be said that, if the officer is able to effect any slight improvement in the child's social adjustment, the plan has been successful, even though the client again comes before the Court. A purely pragmatic test may be adopted on the other hand: namely, if the child does not again come before the Court, or the nature of his delinquent activities declines, then that may be attributed to the social work intervention. If that criterion is used, upon what foundation can it be said that the social work intervention has been responsible for the apparent improvement? What of the situation where the child offends almost immediately after the expiration of the order? That offence may have been merely a case of passive acquiescence in the inevitable, only to resume old habits as soon as possible. But if the test of success is that the child is helped to keep out of trouble during the continuance of the order, then in this last circumstance the procedure could be regarded as a success.

#### BREACH OF SUPERVISION.

The Court must consider the factors set out in s. 37 of the Act in relation to applications for breach of supervision. There are two types of breach: first, the child has failed to observe conditions or instructions

laid down by his child welfare officer, and, second, that he is living in conditions which are unsatisfactory. It would seem therefore, that the Court should have regard only to the manifest behaviour of the child, simply that he has failed to behave in a way that conforms with the conditions of his order or that is contrary to any instructions given by his child welfare officer. Rehabilitation, however, is a complex matter and is not always confined to objective manifestations by way of behaviour. In some cases, the child may be under psychological stress in his home that must eventually lead to some form of release of tension, perhaps in delinquent behaviour. Would the Court have jurisdiction in that type of case to conclude that there had been a breach of supervision? It is submitted that in that situation the second category created by s. 37 would be applicable and it would be possible for the Court to say that the child is living in circumstances which are unsatisfactory. Hence, the second category may be applied, it is contended, in two situations: first, that previously mentioned, and second, in a case of neglect, where the physical conditions of the home fall below the standard required by law. As with all other powers under the Act, the Court may only make an order under s. 37 if it is of the opinion that it is in the interests of the welfare of the child to do so. That must always be the paramount consideration. Thus, the Court may vary the order and make any order that it could have made when it imposed the supervision order, other than an order imposing a penalty, or requiring the payment of damages or costs.

Usually, the child will be charged in very much the same way he would as he had committed an offence. The child welfare officer will file a complaint that a breach of supervision has occurred, specifying the breach. A summons will be served on the child and a notice on his parents. Evidence of the breach will be given and if satisfied, the Court will proceed to vary

the order. A further social background report will be submitted to assist the Court, giving particulars of the course of the supervision order. The most likely course to be taken is that the Court will declare the defendant a ward of the State.

## (2) WARDS OF THE STATE

The legislative provisions as to wards of the State have already been outlined. Essentially, the Director becomes the guardian of the ward to the exclusion of the parents or any other guardian. It is the responsibility of the Director to exercise that guardianship in the best interests of the ward. First, a programme should be formulated although it will sometimes be difficult to put it into operation because of the indeterminate nature of wardship itself. The future of the child in all respect is in the hands of the Director for the parents have no right to appeal to the Court for a review and reassessment. Where the child comes into care because of delinquency the long term aim will usually be to return him home. But as far as the Act and the Court is concerned, the whole future of the child lies within the discretion of the Director. This discretion will be exercised according to the accepted principles of social work and in so far as possible, in co-operation with the parents. Legally, the child must accept this situation, although where it is of long duration it may often lead to resentment on the part of the child. Under the statute the Director has a discretion to adopt any course of action he deems fit. There are no guide lines and no statutory criteria having regard to which it may be said that the Director has acted ultra vires. It would appear, therefore, that there is little, if any, control that may be exercised by the Court. The only rights of the parents and the child are those allowed them by the Director. For this reason, declaration as a ward is a drastic step which should be resorted to only when it is inevitable.



Of course, it is to be remembered that such a situation arises only after all other approaches have failed. But even so, it is submitted, since the programme may be of long duration, administrative inefficiency a possibility and because of the likelihood of personality clashes, there should be legislative provision for a judicial review of the programme of a ward. If the Court should believe it in the interests of the ward it ought to be given power either to discharge the wardship, or reduce it to some form of non-custodial order, such as supervision. In the absence of any such provision, the parents have no right to be heard, regardless of what may be done or suggested by the officers of the Department. Until the social work profession can justify the vesting of such far reaching powers in its practitioners, personal rights of people should not be allowed to be set at naught by an administrator, without giving the parties access to the Courts. The distinction between the consideration accorded the parties by the Court and that accorded them by an administrator is that the former must act judicially and hear both sides, whilst the latter need not, under the terms of the Child Welfare Act, go beyond his own preconceived notions. Parents certainly have no right to be heard by the Director before a decision is made to place the child in an institution. In the submission of the author, this is a serious defect in the legislation and ought to be remedied.

#### JUVENILE INSTITUTIONS IN TASMANIA<sup>7</sup>

One of the methods available to the Director for the placement of wards is by committing them to an institution (s. 46 (2) (b)). Relevant institutions are those conducted by the Department, together with charitable institutions. Private institutions are heavily relied upon for female offenders because the Department has only one institution for girls. Departmental institutions to which delinquent boys may be sent are Wybra Hall and the Ashley Home for Boys, Westwinds home is available for educationally retarded boys who are not

disposed to delinquency. Boys whose delinquent activities are regarded primarily as a result of educational retardation may also be admitted to Westwinds. Some private institutions will accept boys with records of delinquency. These are Harrington Home for Boys, conducted by the Salvation Army, and Kennerley Childrens Homes, which are sponsored by a private committee. For delinquent girls, there are only two institutions: the Departmental home Weerona and Magdalen Home for Girls, which is conducted by the Roman Catholic Sisters of the Order of the Good Shepherd.

The decision to place a ward in one institution or another is the sole prerogative of the Director. Where, however, he chooses to place a ward in a non-State institution, he must consult with the managers before the ward is removed to an alternative placement. This is a natural culmination of the relationship between the institutional staff and the field staff of the Department. An earlier attitude has given way to an approach of co-operation between the private institutions and the Department for the future welfare of the child. During the period of institutional care there will have been constant consultations between all concerned with future planning for the ward and in most cases the institutional staff will facilitate contact between the ward and the parents and siblings. In consultation and co-operation a programme will be developed and put into effect by the institution on the one hand and the field staff of the Department on the other. It is for the institution to work with the child and for the visiting child welfare officer to work with the family in order to prepare them for the ward's eventual return home.

At this stage, it may be emphasised that simply because a ward is placed in an institution, it does not mean that he is left to his own devices and the family ignored and left to theirs. On the contrary, it is then that the most intensive phase of the rehabilitative programme has its

beginning. Overall, the aim of institutional care is to prepare the ward to resume his place in the community as a normal and contented individual. To that end, the problems of the child will be investigated and, in so far as is possible with present knowledge and techniques, remedied in the institution. Families are regarded as important in modern child welfare practice, and, accordingly, any problems in the family that may have contributed to the ward's behaviour will be dealt with by the visiting child welfare officer. In any event, regular contact is maintained with the parents so that the transition from the institution to the community is eased as much as possible. The family must not be allowed to feel that the child in care has been irrevocably cut off. For this reason, contact between the ward and the family during the period in care is not only actively encouraged, but regarded as vital to the overall programme. Therefore the child is allowed to return home for school holidays and weekends which serves the purpose of testing the progress of the programme to date. In any event, it serves to maintain the essential feeling of contact between the ward and his family. Holidays at home may serve to show, in some cases, that a return home is out of the question, in which case, it will be taken into account in future planning. Such are the objectives in the administration of this section of the Act.

These comments are made in relation to the connection between the Director and the private institutions. The same principles are, of course, applied in regard to the institutions operated by the State. A general programme for the ultimate rehabilitation of the ward is put into effect. A good many of the placements in private institutions tend to be long term, so the programme will take shape gradually. Where wards are in the care of departmental homes, the period is usually for only such time as is necessary to effect sufficient improvement to enable the ward to return home. Periods may range, with few exceptions, from about six months up to about two years.

State institutions are not geared to provide long term care and so it becomes essential to have plans for alternative placement of the ward at the end of his institutionalization. With this in mind, parents are usually prepared to receive the child back at the appropriate time. Placements in the private institutions, with the exception of Magdalen Home, are usually made at a younger age where the prospects are that a lengthy period in the institution will be necessary. Hence, this policy gives private institutions a rather more stable level of intake than is the case with the institutions conducted by the Department. It also follows that the participation in the programme for the child must be considerable. In all cases, however, there is co-operation between all the parties, visiting child welfare officers and institutional staff, in respect of each ward in care.

Whilst these programmes are in accordance with the modern concepts of child welfare practice, they are not without problems. Between institutions, and within them, there are opposed points of view and differences in policy. On the one hand, the technique of loving a child back to good behaviour, based upon the claims of psychoanalysts, is used extensively whilst, on the other, firm discipline is also not without its adherents. It has been suggested that the employment of trained staff would greatly alleviate such problems in producing greater uniformity of outlook<sup>8</sup>. Diversity in policy may well be confusing to the child to whom it is incomprehensible. In other cases, the child may appreciate the differences in approach of different staff members and learn to exploit them. To obviate these difficulties, and because it is regarded as desirable, children are placed in institutions only as a last resort. However, for children with records of delinquency or disturbed and difficult behaviour, or both, there are no alternatives. Young children who are reasonably easy to manage may be fostered, but there is still a large number who require some form of institutional care. This

is especially true of those who are prone to delinquency or who exhibit conduct beyond the resources of foster parents. There is nothing more damaging to a child than a long succession of unsuccessful foster placements, inevitably concluding with a somewhat lengthy period in an institution. Institutional care should be, and is, kept to a minimum, but it will never be entirely replaced.

(A) DEPARTMENTAL INSTITUTIONS.

Ashley Home for Boys:

Ashley Home for Boys is an institution for boys between the ages of 15 and 17. The inmates fall into two categories, those who have been declared wards of the State and placed at the home by the Director. Second, boys on remand for a period of assessment prior to final disposal by the Court. In the latter event an assessment of the boy in an institutional setting is made by the Ashley staff and submitted either to the Court or to the Director to be incorporated in a report to the Court at the final hearing and disposal of the case. Any necessary medical or psychiatric tests will also be carried out while the boy is on remand at the institution.

A class system is used to grade the progress of the inmates, those in the top class qualify for residence in the privilege cottage. Discipline is generally more relaxed there than in the rest of the institution. Though as a general rule discipline at Ashley is not harsh. The programme is designed more to provide care and affection for the boys in order that they may relate easily to members of the staff. In such an environment, it is hoped that the relationship may prove supportive and the boy gradually counselled so that he may cope with his problems unaided. When it is adjudged that that stage has been reached, the boy is then said to be ready to again face life in the community. However, there are disciplinary facilities for those who

do not respond and show this by persistent absconding or bad behaviour. They may be accommodated in a secure unit, which has a capacity of 6 at any one time. The time limit is usually 24 hours. Ashley Boys Home is capable of holding about forty boys but it is unusual for it to be full to capacity.

Welfare counselling and assistance is available from the staff employed for that purpose. It consists of the superintendant, deputy superintendant and two housemasters. Besides these, there are other personnel. There are security officers, who are responsible for physical supervision only. A trades and a farming instructor are employed for the instruction of the boys in trades and rural occupations respectively. Attached to the home is a farm, and the institution is self-sufficient in most forms of primary produce. There are other miscellaneous staff at Ashley, such as cooks and domestic staff.

Ashley Boys Home is a wholly residential establishment. Boys are occupied either on the farm or in the trades shop or in general chores around the home. Which means, of course, that there is no opportunity for the continuance of formal education. To fill that gap, the Education Department Correspondence School supplies correspondence lessons. These are done by the boys under the supervision of a housemaster, and a school teacher who comes in on a part-time basis to give tuition to those who require it. Only rarely have boys been able to continue schooling at the local High School.

Prima facie this may appear to be a serious deficiency, not to be tolerated today. The position, though, is not really as serious as it may appear. Boys who come into care frequently have a deep seated aversion to school. Even if they have the intellectual ability to benefit from education, they have dropped so far behind that they can work only at an elementary level. If they do not have the ability, then further compulsory education will be scarcely conducive to their ultimate rehabilitation. The

correspondence system enables each boy to work at his own pace, without the embarrassment of displaying his lack of ability to a class room full of others. He is free from the stress imposed by competition and from the necessity to meet some pre-determined standard which is out of his reach. Beyond argument is the proposition that the boys must live with the community as it is, and subject to the stress and strains that normal living imposes. But it is essential to recognise when the limit of a boy's capacity has been reached. The boy should be assisted to develop his own potential to the full, but if he lacks certain abilities this fact should be recognised. Exemptions from attendance at school are frequently sought on behalf of such boys as those at Ashley.

Training falls principally into three categories. There is training on the farm, in the trades shop and in general duties. Some boys are discharged to placements on farms, on a live-in basis with a country family. Most boys, however, are city dwellers, and they return to their city homes after discharge. For the duties in the trades shop and general duties are the most useful, in terms of experience that may count in later employment. Duties on the farm though are the most popular among the inmates, six of whom are so employed. In addition about six boys are taught carpentry, and another two or three are employed in the maintenance section. The others are occupied on general duties and special jobs. About four are employed in the kitchen. If a boy does not succeed at a special job, he may be transferred to general duties which involves a loss in status and a reduction of pocket money.

Except for weekends, there is a set daily routine, which are not strictly organised. Visiting by the boys' families is most usual at weekends but is not restricted to those days. Boys may go out with their parents on day leave and contact of this nature is encouraged, for the reasons discussed earlier.

Punishment is by way of the class system and privileges are awarded in the same way. Privileges and pocket money are granted according to the class in which the inmate is placed. Between the secure unit and the privilege cottage there are five classes. Boys are placed according to their conduct and industry. The fifth class is reserved for short term placement for punitive purposes. After he has served his time in the fifth class the boy is restored to his former class. New arrivals are automatically placed in the third class and move up or down according to their conduct. By moving boys from one class to another punishment may be administered or privileges conferred. Positions in the classes are reviewed each month, the criteria being the boy's conduct and industry. It does not follow, though, that because an inmate fails to reach the top class or the privilege cottage, that the period of institutionalization will be extended until he does. Normally, a boy will be discharged when it is considered that he has made sufficient improvement and the home situation is such that he may be re-introduced there. If it is considered that a further period at Ashley would achieve no good purpose, then the boy will be discharged regardless of his privilege rating. It is all a matter of the Director's discretion, which will be exercised having regard to reports from the child welfare officer as to the home situation, and from the institution.

#### WYBRA HALL HOME FOR BOYS

Wybra is set in rural surroundings, seventeen miles from Hobart. It has accommodation for up to thirty-six boys. Usually the number in residence is between twenty and thirty. It is intended for boys within the age group of ten to fifteen. As with Ashley, the inmates principally fall into two classes. On the one hand there is a usually small number on remand for assessment under s. 24 of the Child Welfare Act. Investigations as to the home conditions and the personal problems and attitudes of the boy are conducted and reported



to the Court in the same way as with the Ashley boys. The second, and by far the larger category, is the category of inmates in the ten to fifteen age group, who are undergoing institutional care because of their delinquency. About a hundred acres of land surround the home, and the boys care for a herd of cattle. Vegetables are grown in sufficient quantities to be a significant supplement to the Wybra menu.

Staffing is broadly on two levels. The superintendent has the overall supervision of the home, and is responsible directly to the Director. He is also responsible for the welfare counselling of the boys. In this, he is assisted by a deputy superintendent and a housemaster. The housemaster is non-resident, but his role is to supervise the boys, and at the same time gain their confidence and respect so that meaningful relationships may develop. It is the hope that, upon this basis, the boys may be counselled into a frame of mind conducive to a law abiding existence in the community. This is also an important responsibility of the superintendent and deputy superintendent, in addition to the housemaster. It is these three officers who are responsible for the assessment and counselling of the inmates. Regular reports of progress are prepared and sent to the Director. These are prepared either by the housemaster or the deputy-superintendent, and are transmitted through the superintendent who adds his comments. The other limb of the staff comprises the matron, sub-matron and a cook, who are resident. Other members of the staff who are non-resident are the utility officer, domestic worker, and an additional cook. These officers have no official role in counselling. In this respect, Wybra and Ashley resemble each other.

Where they differ, however, is in respect of the education of the inmates. At Wybra, it is the policy of the home to send all boys to the Brighton Area School, which is about two miles distant, and is the school which caters for the district generally. Here the Wybra boys mix with the other children

from the district and are educated normally at the school. On the whole the arrangement has been satisfactory. Although the boys are in care because of delinquency, there have been relatively few outbreaks of delinquent behaviour at the school. There is an attitude of co-operation between the school staff and the institution. That the boys are able to attend school in the ordinary way is considered to be beneficial to the programme of the home in that the boys do not entirely lose contact with the community outside.

At Hybra all the boys are treated equally, there being no system of class or privilege. Progress is evaluated by their attitudes and conduct as assessed by the appropriate staff members. There is a small secure unit, which is used only for absconders and for persistent and serious breaches of discipline. The routine to which each boy is expected to conform is quite highly organised. Each minute of the day is planned, there is little flexibility and nothing left for chance. High standards of courtesy, behaviour, personal habits and cleanliness are demanded. It is considered that the development of these habits is the most realistic way to assist the boy back to life in the community. His progress is measured by his ability to conform to these standards. When he is able to maintain these standards in a satisfactory manner he is thought to be ready for discharge to the care of his parents, or to some other suitable placement.

For the boys in the charge of the cattle, the day commences at seven o'clock in the morning, and for the others at half past seven. The day closes at half past eight in the evening, when the lights are turned off. Between these two extremes, every minute is accounted for by the programmed routine. Tuesdays and Thursdays are known as play-days, which means that between four and five o'clock in the afternoon there is some form of compulsory sport. Weekends are not so highly organised. Saturday morning is organised, but in the afternoon the programme is free. Subject to the

requirement of attendance at Church on Sunday the routine for Sunday is flexible.

Visiting by parents and friends is encouraged. Weekend afternoons are often used for that purpose. Parents are permitted to take the boys for outings on visiting days, in this way contact between the inmate and family is maintained.

Physical punishment is not generally used. Conduct falling below standard and requiring some retribution is dealt with by the withdrawal of a privilege. There are only minor exceptions to this policy, notably absconders, who are canned and placed in the secure unit.

#### WESTWINDS HOME FOR BOYS.

This is an institution for educationally retarded boys younger than fourteen. It is situated in the country, about thirty miles from Hobart. In addition to the main wing, there is a cottage for working boys who are employed on the farm attached to the home.

The staff comprises a superintendant and a deputy superintendant, together with a housemaster. In addition there is a matron and supporting domestic staff. There is a close relationship between the home and the Combined Children's Centre, the childrens' wing of the Mental Health Services Commission. A child psychiatrist visits Westwinds at frequent and regular intervals, and the services of psychologists and psychiatric social workers are available upon request. Such a service is essential in view of the type of inmate at the home. Westwinds is not primarily a home for delinquent boys, but often it is an appearance before the Children's Court that brings the retardation of an offender under attention. In fact, a significant proportion of those at Westwinds are there because of an appearance in the Children's Court. In view of the type of care at the home, proper remedial educational facilities are essential.

As with Wybra Hall, the local school co-operates with the home. In practice it is often found that all the Westwinds boys are placed in the one special class, not because they are from the home, but because they are all in need of special education. This is best provided to them as members of a single group, rather than as isolated members of a normal class.

Programmes at Westwinds are planned by the staff in consultation with the visiting psychiatrist and an attempt has been made not to allow the programme to become regimented. Competition between the boys is not encouraged. Results are best if each inmate is allowed to find his own level free from the stresses and strains of competition. As with the other departmental homes, visiting by parents is important. If conditions are suitable at home, and if it is thought the boy can cope with them, school holidays are spent there, or with interested relatives.

Leisure activities are not closely organised, and the routine flexible. There must of course be some basic rules. Only boys who adapt to an open programme can be kept at Westwinds. It has no facilities for the accommodation of absconders. For those who persistently abscond, removal to Wybra Hall is the only alternative. Also, the home has developed a policy of developing a close relationship with the local residents. It is hoped that by this, the boys may be made feel part of the community. Some of the locals support the home by visiting the boys and taking them for outings. Inmates who abscond and commit offences in the district tend to destroy this harmony to the detriment of all concerned. Whilst it is true that many at Westwinds come into care because of court appearances, the home is neither regarded nor conducted as a home for delinquents. It has not the facilities or the policy to deal with them. Behaviour most amenable to the Westwinds environment is the disturbed behaviour of children who are handicapped because of educational retardation and low intelligence. If the previously delinquent

behaviour of the child is due to these factors, then the programme at Westwinds is the most suitable for his needs.

It is impossible to accommodate older boys, that is those between the ages of about fifteen and seventeen, in the same institution as much younger boys. Those in this latter age group who have not reached the stage where they may be discharged, or have no suitable outside placement, are placed in the farm cottage. That has accommodation for about eight, who work on the farm under the supervision of the farm supervisor. The skills developed here could be useful in later employment, but most of the boys at Westwinds come from city backgrounds and their future will lie in city life. Employment is most likely to be of an elementary industrial nature at an unskilled level. Where it is not possible for an ex-inmate to compete on the normal work market, he may find an occupation as a protected worker in industry, or in a sheltered workshop. Farming skills learned at the farm will be of no direct benefit and it may be thought that some form of industrial training would be better, which may well be the case. However, the discipline of working, as opposed to attending a school class, is obtained from the farm. If these skills and disciplines could be acquired in a setting more akin to what the boy will find in reality, it would seem that the benefit derived would be appreciably enhanced. No doubt, the fact of the home being situated in a country area makes this both difficult and expensive. It may be that in the future more consideration should be given to locating such institutions in the city, where more facilities are available.

#### WEEROONA GIRLS' TRAINING CENTRE.

Weeroona is the only State institution for girls. It has accommodation for twenty five, between the ages of twelve and seventeen. It is situated at Latrobe, on the north-west coast. The Weeroona staff consists of a principal, deputy principal, cook, laundress and two attendants. Welfare counselling is the responsibility of the principal and deputy principal.

As with the other institutions, regular reports on the progress of the girls are submitted to the Director.

Educational facilities are available at the Latrobe School, which suitable and interested girls have been permitted to attend. Mostly, however, they do not respond to further education. As in the case of Ashley, correspondence courses are available, but not frequently undertaken. Interests of girls in education has been found to be quite difficult to stimulate, and thus, they must be occupied in some other way, usually at the home. Groups are formed, one for the laundry, another the kitchen, and the third in general household duties. Duties are rostered so that experience is evenly divided. There is a flexible routine for weekdays. Visiting is not restricted to particular days and times. For the reasons already given, it is encouraged, and regarded as an important part of the overall process.

A secure unit is attached to the institution, four girls, each in a separate cubicle, may be locked up at once. Resort to the secure unit is had only for persistent bad behaviour, or for absconding, which is regarded seriously because of the risk of venereal disease. Less serious misconduct is met by the withdrawal of privileges.

Upon discharge from Wearoon, the girls are either sent home, or to a suitable live-in employment placement. Delinquent girls are often much more difficult to handle than boys. Future placement therefore poses a problem of some difficulty. In some cases, they are sent home but, in other cases, relationships have deteriorated so much that home is out of the question. These are the girls with whom placement difficulties are greatest. Promiscuous girls are likely to make allegations against the husband of families with whom they are placed, which is a particularly unfortunate circumstance, particularly where it is taken seriously and without regard to the antecedents of the complainant.

(B) PRIVATE INSTITUTIONSBarrington Home for Boys.

This home is conducted by the Salvation Army, and is situated in a central area at New Town, in Hobart. It has accommodation for about forty boys and some girls, between the ages of five and sixteen. The policy of the Home is to limit the number of children who have court records and, in practice, about one third have been before the court. The others have been admitted privately by their parents or are wards of the State who have come into care because of neglect, as opposed to delinquency. Barrington therefore, caters for a wide range of children of differing ages, backgrounds and needs. Also within the home is a mixed cottage which accommodates both girls and boys. This sometimes avoids the need to split siblings who come into care at the same time. In concept, it is intended that this cottage will live as an ordinary family. Cottage parents, a married couple, look after the children in the ordinary way.

The educational needs of the inmates can be met easily, owing to the central location. There is an easy routine, and weekends are virtually free. Outings are arranged by the staff and parental visiting is encouraged on Saturdays. On each alternate Saturday parents may take their children from 9 o'clock in the morning till half past seven in the evening. Children may spend one weekend each month at home. This open routine means that the home is not physically isolated and the boys are free to walk around the city. There are, however, relatively few abscondings. It does mean though, that any inmates who seriously misbehave, or persistently abscond cannot be maintained. Discipline is administered by the child being required to perform some incongenial task.

Within this framework, the children are allowed to occupy themselves as they wish. Organised activities are not emphasised, but are available for those who wish to participate.

In this setting, Barrington cares for children of widely differing backgrounds and needs. There is close co-operation between the home and the Department. An overall plan is put into operation for each ward. The concept of the cottage home is interesting, and is a means of creating a more normal environment within the institutional setting. To break up families and separate siblings in different institutions is no longer regarded as an effective method of child care. Group homes are important from this point of view. They do seem, however, more adapted for children who are in care, because of parental neglect. For cases where all, or more than one child has been removed, ties between the siblings may be maintained in the cottage home.

#### KENNERLEY CHILDREN'S HOMES

It is Kennerley that has made the fullest use of the cottage concept. Formerly located in a large building at West Hobart, the home now consists of some six or so cottages within easy reach of each other in the Chigwell-Claremont area. Each unit consists of cottage parents and a group of some six to eight children. Ages of the children range from six to about sixteen years. Every attempt is made to provide an ordinary family atmosphere. The cottage father is employed at his job in the ordinary way and there is nothing to stigmatise the children as having been committed to an institution.

This type of care is most beneficial for the child who will be in care for a long period. If families come into care, it offers the possibility of a placement where they may be kept together. Age and sex distinctions drawn by the older type institution have often been responsible for the separation of siblings. Placement in a cottage home avoids this. Of course, the only children who can be accepted into a cottage placement are those who do not present problems of behaviour that cannot be dealt with in a normal environment. An absconder cannot be admitted, nor can the problems



created by the persistent bad behaviour of one or two children be allowed to affect the whole group. These institutions probably have the most to offer the non-delinquent victims of neglect. Provided they do not otherwise present difficulties of control, young children have the opportunity for a relatively ordinary home life that should assist their overall adjustment.

#### BETHANY HOME FOR BOYS.

Bethany Childrens' Home also is conducted as a large family, under the care of a married couple as superintendant and matron and two domestic assistants. Accommodation for about twelve boys in the age range of five to about fourteen is available. The policy of the home is to accept children at as young an age as possible to ensure greater continuity of care. It does not cater for the delinquent child, but rather for the young disturbed child who is the victim of neglect or a broken home. Private placements are accepted but, in fact, most of those in care at the home are wards.

Because of the nature of the group, the home does not have a rigid routine, other than that which is necessary for overall management. It is hoped that the boys can form normal friendships among themselves and their schoolmates. They attend the schools in the area and those who require special schooling are catered for.

Generally, the Bethany boys are somewhat long-term placements. Visiting at weekends is encouraged, and every attempt is made to maintain contact with parents and siblings. Close contact is maintained between the home and the relevant schools. Regular visits, where necessary, are made to the Combined Children's Centre for those children under psychiatric treatment. Both the superintendant and his wife, the matron, operate as father and mother figures respectively. There is, however, no attempt to conceal his true family from the child and, indeed, contact is actively encouraged. These do not, however, provide sufficient recreation and holiday facilities.

For this purpose interested members of the public take an interest in the boys and holiday placements are arranged annually. The home is operated by the Church of Christ, and is assisted by interested members of the congregation.

#### MAGDALEN HOME FOR GIRLS

This home, conducted by the Catholic Church, is for girls with a disposition towards delinquency or moral corruptibility. It provides social work counselling, some staff members being professionally qualified. About a hundred and fifty girls may be accommodated.

The institution is integrated as a part of the social service structure of the Church. It has an overall programme for the rehabilitation of the inmates. Prior to admission, the girls are interviewed and assessed. Only if it is thought that a ward will assimilate satisfactorily and respond to the programme, will she be accepted. Educational facilities are available for those who are likely to benefit. As a general rule, the girls are employed within the home, in a commercial laundry conducted on the premises by the institution and in various domestic chores. There has, in the past, been little contact with the outside community. To ease the transition, some may be admitted to a hostel conducted by the home where they may accept normal employment.

#### GENERAL SUMMARY

The Children's Court has the direct responsibility for the committal of children to the care of the State. Only the Court stands between a child who comes before it for a delinquency charge or as a neglected child, and a period of care in the custody of the Department. There is no provision for review of a programme, which makes the responsibility of the Magistrate an onerous one. On another level, the environment in which welfare programmes

are put into effect is, in intention, a system of social casework. It is within this system that the Court must operate. Its function is one that can be fulfilled only if the court is fully informed and appreciative of the nature both of the social and psychological factors which have influenced the child's behaviour in the past and the nature of such processes that will come into play upon the decision of the Court to make an order, be it custodial or non-custodial.

Custodial care is the most drastic order and may be relevant for both delinquent and neglected children. Sometimes the distinction is a hard one to draw whilst sometimes it is an artificial one.

If the welfare institutions charged with the administration of the child welfare legislation are to translate the intention of the statute into reality then the service must be geared to meet the needs of children as individuals, not as mere members of some ubiquitous class. Tierney has said<sup>9</sup> that attention must be given to several administrative areas in the execution of child welfare policy, including the decentralization of decision-making processes. The object being that the persons who are in direct contact with the child, and who have the most direct knowledge of him and his circumstances, should have direct influence upon decisions affecting his welfare. If all decisions are made on a centralized level, the possibility is that they may not be in accordance with individual needs. Processes can become standardised and stereotyped, which means that the child must fit into some administrative system, irrespective of his needs, the antithesis of good child welfare practice. The child welfare homes in Tasmania are small and the Department itself quite small. Regular consultation and co-operative action is thus facilitated. It is the policy of the institutions and the Department to collaborate in the development and

execution of a programme for the rehabilitation of the child. Whilst in care regular reports on each ward are prepared and placed on the case history, to ensure consistency and continuity. Every attempt should be made to prevent the welfare services from becoming unwieldy, so that problems and failures of communication do not occur.

This is the social work situation that needs to be accommodated by the legislation. As the Act stands at present, all final decisions must be made by the Director. It is he who is the legal guardian of all wards. It is he who is responsible for their maintenance and welfare. It is the Director who is responsible for the overall administration of the statute. The statutory position must not, of course, be allowed to justify a system that fails to take account of particular needs. But it inevitably means that there must be a policy that complies with the Act. A Department set up by statute has only the mandate it has been given by Parliament. Welfare statutes, it is submitted, should be sufficiently flexible to allow a general policy may be developed but, at the same time, allowing for sufficient flexibility in internal administration to accommodate the particular needs of individuals. It would seem that the most effective method of ensuring this would be to adopt the scheme of the Tasmanian Act. There, the Director is given a broad responsibility in general terms. Details of the policy may then be left for development according to the best principles of child welfare practice. No doubt, this may lead to the situation where rigid procedures come to be entrenched and, thus, incapable of adaptation for particular cases. Awareness of this possibility and professionalism on the part of those concerned should be at least one insurance against inflexibility. But it is an area where a properly constituted and socially aware Childrens Court could make an invaluable contribution. Neither parents, nor anyone else with a legitimate interest, has any right to be heard by

the Department before a decision is taken. It is partly because of this that individual children may lose their way in the wilderness.

It was also noted in the same study that the separation of siblings was prevalent because of the lack of facilities for keeping them together. Tasmanian institutions have made a good start in solving this problem. Both the Kennerley and Barrington Homes have group homes and these are used, where possible, for the placement of sibling groups. As yet there are too few placements of this nature available and it is to be hoped that they will be developed further in the future.

To canvass all the relative strengths and weaknesses of the child welfare services is beyond the scope of this thesis. But as it is to these services that the child must be committed by the Court, some general description of the aims and objectives appears to be necessary. Moreover, the Court is part of the service, because it is through the Court that the child comes into care in the first place. Welfare programmes and principles determine the way he shall be treated subsequently, but the initial responsibility is with the Court, which reaches its decision having regard to social welfare ideals.

Looked at in this light there are a maze of services available. On the one hand there are the services provided by the Social Welfare Department, both in respect of field supervision at home, and institutional care. The latter are provided both by the Department and charities. Most of the institutional care for neglected children is provided by the charitable homes. In addition to these, the Education Department has responsibility for the counselling of children who are truant problems. The parents may be prosecuted under the Education Act 1932 (Tas.). Two convictions constitute a ground for the child concerned being charged as neglected under the Child Welfare Act. The correspondence between truancy and delinquency has already

been noted<sup>10</sup>. Psychological counselling is provided by the Guidance Branch of the Education Department. Frequently the children who come under the attention of this Branch also require supervision at home or their parents may request some form of assistance. Such services are most readily available from the Social Welfare Department. An overwhelming number of children who come under the notice of the welfare services come from public housing subdivisions, that is from homes rented from the Housing Department. To provide for the well-being of its tenants, the Housing Department too, has a staff of welfare officers. These officers often notice that children are in need of assistance to help them cope with their behaviour problems. The Housing Department officers are not infrequently the first to observe the early signs of neglect. Also interested in the physical health of children are the sisters of the School Health Services, who are officers of the Health Department. Their function is to visit schools to check the health of pupils. Finally, but of particular significance, is the Police Department, whose interests range from delinquency to the detection of cases of neglect. All of these bodies have legitimate interests in the welfare of children, some provide specialized services, and all come into direct contact with children and families. Superimposed upon these services, are the psychiatric services provided by the Mental Health Services Commission. These are specialist services, and children are accepted only if referred through the appropriate channels.

The only agencies, however, that the law envisages will have any direct standing with the Court, are the police and Social Welfare Department. This means that a certain uniformity of approach may be maintained as to proceedings before the Court. Prior to prosecution, the other agencies may have had extensive contact with the child and family. Services provided in this manner can be voluntary only, owing to the lack of standing under the Child Welfare Act. In his study of the Victorian system, Tierney noted<sup>11</sup> that

the social services were fragmented. The same may be said of the Tasmanian services, in the sense that prior to official intervention by the Social Welfare Department, any or many of the above agencies may have had dealings with any one child or his family. Any decision to take proceedings before the Court must be taken either by the police or the Social Welfare Department. A decision that the child should be taken into care may be taken by the Director alone. Co-ordination in this respect is possible under the Tasmanian Act because of the power conferred upon the Director. That is not to say, though, that prior to the involvement of his Department there may not have been many and varied approaches.

Indeed, the police may have warned the child and threatened the parents. The Education Department may have launched prosecutions for truancy, the psychiatric services accepted a referral, the Housing Department welfare officers made suggestions. None of these agencies have the legislative authority to provide the long term supervision and institutional care that may be necessary in particular cases. Perhaps in this limited sense, it may be said that the services are fragmented. From a legislative point of view, no agency has the statutory function to detect cases where social work assistance may be necessary. This is an important aspect of social welfare, and is left to the day to day administration of the various services. There is though, another aspect of the question.

Before the social problem has reached the stage where intervention by the Court is justified, many of the other agencies may have had dealings with the same case. There may or may not have been consultation, the approach may or may not have been consistent. Viewed from this angle, too, it may be said that the services are fragmented. None of the agencies have the statutory duty to co-ordinate or consult with each other. No statute gives one body the exclusive function of caring for the overall welfare of children.

Only when the case has reached the stage where proceedings in the Court are instituted does the Child Welfare Act confer a statutory role upon the Social Welfare Department. The whole pre-court counselling and social work assistance is left without statutory warrant. This being so, any co-operation between the services from a legal standpoint, is purely voluntary and ad hoc. In recent times, this approach to social services has come under attack<sup>12</sup>. It is thought that there is greater benefit if the approach is co-ordinated. Very few social problems can be isolated, in the sense that they are within the exclusive province of any particular agency.

The Ingleby Committee<sup>13</sup> found this to be a shortcoming in the English services. It suggested that, in dealing with children in need of assistance, three stages should be clearly defined, viz., the detection of those in need of assistance, diagnosis of the particular problem, and the provision of treatment facilities. If these phases are confused, then the value of assistance rendered will be impaired. The different phases should be clearly defined, and the agency which is best equipped should be given primary responsibility. Co-ordination is best achieved, it is submitted, where one agency has the initial responsibility for child welfare, with the necessary skilled staff to make referrals to the specialized services when required.

It is at least arguable that the Child Welfare Act should be broadened to make all legal action against children and prosecutions for such matters as truancy subject to the supervision of the Social Welfare Department. At present, the Department may provide assistance to children at risk, but is under no statutory duty to do so. Also, it previously had the added advantage of exerting control over the types of situation in which prosecutions against children were launched under regulation 6 of the Child Welfare Regulations. The consent of the Social Welfare Department was necessary before any proceedings could be brought against a child in the Children's



Court, which had the effect of requiring police reports to be submitted to the Department for consent before filing a complaint. While the regulation was in force, Departmental consent for prosecutions was almost a formality, only in rare cases was consent refused<sup>14</sup>. Accordingly, it became an anomaly and an administrative nuisance and was repealed in 1968, which proved a retrograde step. Today, prosecutions may be brought for any trivial reason whatever. Certainly it is not the role of the police to consider the welfare of a child when deciding whether to prosecute for an offence be it summary, indictable, or merely trivial. Suffice to say that many of the children who come before the Court do so for minor offences and are admonished and discharged. Such a procedure is alien to the concept of the welfare approach to Children's Court proceedings. Had the Department chosen to make a social background report at the time the police report was submitted to it, instead of merely stamping an approval as a clerical formality, many children would have been saved the experience of appearing before the Court. A police and court record need never have been built up at all. To comply with the social work concept, children should not be brought before the Court for punishment purposes only, which could be prevented if a social investigation had been made prior to the authorization of proceedings. Any decision to approve or disapprove proceedings could be made in the light of the needs of the child. If social work assistance was not required, then there would be no need for the Court proceedings at all, in which case they need not be authorized. On the other hand, cases that were in need of the services of the child welfare authorities, or where the appearance would in itself have some beneficial effect, proceedings could be authorized. Only children in need of the social work intervention would be called upon to face the Court.

The Children's Court is an important jurisdiction, determining the future and attitudes of children at a vulnerable point in life. Entirely inconsistent with this notion is that the Court may be used for the mere deterrence of childish pranks. An appearance to plead guilty to the illegal use of a bicycle by a perfectly well adjusted child, just to impress other children who may happen to hear about it, is not the function of the Children's Court. No doubt the Court has a reputation among those most likely to come before it. It is much better that it should have a positive reputation than simply that of doing nothing. Children who are admonished and discharged are unaware of the provisions of the Probation of Offenders Act, 1973 (Tas.) to them they have simply been excused.

Chapter 3 - Notes.

1. S. 18 Criminal Code (Tas.)
2. Child Welfare Act 1960 (Tas.) ss. 5, 6 & 7.
3. Child Welfare Act 1960 (Tas) s. 34 (1)
4. Child Welfare Act 1960 (Tas.) s. 37
5. The Probation and After-Care Services, ed. King 3rd ed. p 25
6. Supra p. 90
7. Acknowledgment of indebtedness to Miss Dauntton-Fear's book  
 "The Correctional Agencies of Tasmania" is made in respect of  
 this part of the discussion. However, the author also writes  
 from his personal knowledge as a former officer of the Department.
8. Supra p 47
9. Tierney: Children Who Need Help (1963) p 109
10. Ch. 2.
11. Supra p 112
12. See Report of the Seeborn Committee Cmd. 3703
13. Report of the Committee on Children and Young Persons H.M.S.O.  
London Cmd. 1191 1960
14. 1963-64 1226 police reports, approval refused in 111 cases  
 1964-65 1076 police reports, approval refused in 66 cases  
 1965-66 1257 police reports, approval refused in 96 cases  
 1966-67 1413 police reports, approval refused in 80 cases  
 See the respective annual reports of the Department of Social  
 Welfare.

CHAPTER 4THE NEGLECTED CHILD

It is not only delinquent children who come within the purview of the Children's Court which also has cognizance in respect of those children who are uncontrollable or neglected. This category is defined by s. 31 of the Child Welfare Act which looks mainly to the condition of the child's physical environment and it is principally in regard to this external criterion that neglect is defined. Thus, a child will be regarded as neglected if he has no parent or guardian or his parent or guardian is either unfit to exercise proper care and control or is not exercising such control. He may be considered neglected, too, if he is beyond the control of the parents or guardians with whom he is living. Association or residence with a thief, drunkard, prostitute or a person without apparent means of support will also constitute neglect. A child found wandering without any settled place of abode, who is without means of subsistence, or who is begging, or loitering for the purpose of begging, is classified as neglected, as is a child found in a brothel or opium den. Similarly a female child who solicits, importunes or accosts for immoral purposes is neglected. If two convictions against a parent under s. 9 of the Education Act 1932 (Tas) are recorded in respect of school truancy, then the child concerned comes within the definition of a neglected child. Finally, a child will be classified as neglected if he dwells with a person who has venereal disease or tuberculosis so that the child's health is endangered. Under s. 32 it is provided that proper care will not have been exercised if a child has not been provided with the necessary food, lodging, clothing, medical aid or nursing or if he is neglected, ill-treated or exposed by his parent or guardian.

Child neglect is, therefore, basically defined with reference to the physical environment in which the child is found. There is a further provision

under s. 33 whereby a person who has the care or custody of a child may bring him before the Children's Court if that person considers him to be beyond his control. This enables a despairing parent to have recourse to the Court. It also means that the parent must accept responsibility for instituting the processes of the Court.

Where a Magistrate is satisfied upon the oath of the Director of Social Welfare, a child welfare officer, a police officer or some person of good repute that there are reasonable grounds for believing that a child is neglected, he may issue a summons requiring the person in charge of the child to bring him before the Court. Alternatively, by s. 32 of the Act, the justice may issue a warrant authorizing a child welfare officer or a police officer to bring the child before the Court. When a child is brought before the Court under either s. 32 or s. 33 it may declare him to be a ward of the State or impose a supervision order. It seems to follow from the wording of s. 34 (1) that a child who is dealt with under s. 33 is "uncontrollable", whereas one dealt with under s. 32 is "neglected". The significance of the distinction is that the Court may, in respect of a neglected child, in addition to making an order as to wardship or supervision, also require the parents or guardians to enter into a recognizance to provide proper care and control and to comply with such conditions as the Court considers just in the circumstances. There is no corresponding power if the complaint is under s. 33. This follows naturally from the fact that it is the parent or guardian who initiated the proceedings.

As with those children who come before the Court as a result of their delinquent behaviour, the aim of the legislation is their welfare and rehabilitation. First, the Court must determine whether the fact of neglect, according to the statutory definition, is established or whether there is sufficient evidence of uncontrollability. Insofar as that determination is concerned, it is an ordinary judicial proceeding but thereafter the paternal

jurisdiction of the Court arises. A child welfare officer will have prepared a report. If it is a case of neglect, the circumstances will be fully described, together with the efforts that have already been made to alleviate the problem. Usually the report will contain a recommendation as to the course of action most likely to be beneficial to the child.

In some cases, it may be thought that the fact of the Court appearance and the quasi-legal status of the Social Welfare Department will be sufficient to induce better standards of parental care. A supervision order in respect of the children may be made in such circumstances. Other families may have a long history of inadequate standards and failure to respond to efforts by the welfare authorities. Standards of parental care may be so inadequate that there is no hope of any improvement and in such cases the report will usually recommend that the children be declared wards of the State. A similar procedure is followed for uncontrollable children. It does not, as already explained, always follow that a child will be removed from home simply because he is declared a ward of the State. That decision is within the discretion of the Director.

If it is considered that the home environment could be improved, then children may be allowed to remain in the care of their parents. Serious cases of neglect, of course, require removal of the victims particularly if they are infants. When children are removed from home they are placed by the Director depending on what he considers their best interests to be. Young children may be placed in foster homes and this is most usually done where it is thought that there will be no possibility of a return home for quite some time. For this type of care to be successful the behaviour of the child must be sufficiently stable for the foster parents to be able to cope. Those who are beyond the age for fostering and those who exhibit symptoms of disturbed behaviour may be admitted to appropriate institutions.

Interested relatives may also be asked to accept children in order to help maintain family affiliations. In each case it is for the Director to decide, the function of the Court ending once the child has been declared a ward.

It is to be noted that it is the child who is said by the Act to be neglected or uncontrollable and that is so notwithstanding that it is the parents who have failed in their duty to provide proper care and control. Despite this, the scheme of the Act is designed for the assistance and guidance of children.

Section 102 of the Maintenance Act 1926-1941 (S.A.) was to the effect that a destitute or neglected child could be placed by the Court in a home or under the care of the Children's Welfare and Public Relief Board until the age of eighteen. The effect of that provision was considered by the Supreme Court of South Australia in Neale v. Colquhoun<sup>1</sup>. Far from being punitive the Court said the jurisdiction was akin to the ancient function of the Crown as parens patriae. The Court of Chancery had an inherent jurisdiction to interfere for the protection of the welfare of an infant. That was not, however, to say that the Act was entirely non-punitive in its aim. If the child were neglected in the custody of the parents, then in respect of them an order may be punitive. For example, as already noted, they may be required to enter into a recognizance to provide proper care. Where the child is declared a ward and taken into care, such an order as a recognizance would have little effect but, in the event that the neglected child merely being placed under a supervision order, it could serve a useful purpose. Breach of a recognizance is met by a penalty and, to that extent, the Act may be said to be punitive. On the other hand, the order may relate to a child who is uncontrollable. If he is placed under a supervision order or is made a ward, then the Court may hold that the order was, with respect to the child, a punitive one.

From this line of reasoning, it follows that a child under seven years may be found to be neglected or uncontrollable. If the Act is not punitive and is for guidance only, then neglect or uncontrollability is not to be made subject to the rule that a child must have the capacity to understand the nature of his situation, in the same way that one under seven is presumed not to have criminal capacity. This has in fact been so decided by the Supreme Court of New South Wales. Section 126 of the Child Welfare Act 1939-1956 (N.S.W.) conclusively presumed that no child under eight could be guilty of an offence. The question before the Court in Ex parte Dorman; Re Macreadie<sup>2</sup> was whether neglect was an offence within the meaning of the Act. Maguire J. held that it was not. So it follows that, even though a child cannot be guilty of an offence unless he is over seven, he may still be charged before the Children's Court as being neglected or uncontrollable.

At common law, a father had legal custody of his infant children, a right he could, and still may, enforce by way of a writ of habeas corpus. This principle has been modified to the extent that, where the custody of a child is in question before a Court, the welfare of the child is regarded as the paramount consideration<sup>3</sup>. However, the basic principle is that enunciated by the Court of Appeal in In re Agar-Ellis, Agar-Ellis v. Lascelles<sup>4</sup>: -

"The right of the father to the custody and control of his children is one of the most sacred of rights. No doubt the law may take away from him this right or may interfere with his exercise of it, just as it may interfere with his life, or his property or interfere with his liberty, but it must be for some sufficient cause known to the law. He may have forfeited such parental right by moral misconduct or by the profession of immoral or irreligious opinions deemed to unfit him to have the charge of any child at all; or he may have abdicated such rights by a course of conduct which would make a resumption of his authority capricious and cruel".



The father must then be absolutely unfit to have the custody of his children before his right may be abrogated but the Crown always, as parens patriae, had regard for the welfare of all children as the first and paramount consideration. When the welfare of children was not properly observed by the father, the Crown could then intervene. This function was exercised by the Court of Chancery as the delegate of the Crown for this purpose. Thus arose the general equitable jurisdiction of the Supreme Court to remove a child from the custody of its father in the interests of the child's welfare. The nature of this jurisdiction was explained by Lord Esher M.R. in R. v. Gwyll<sup>5</sup> : -

"The Court is placed in a position by reason of the prerogative of the Crown to act as supreme parent of children and must exercise that jurisdiction in the manner in which a wise affectionate and careful parent would act for the welfare of the child. The natural parent in the particular case may be affectionate, and may be intending to act for the child's good, but may be unwise and may not be doing what a wise affectionate and careful parent would do. The Court may say in such a case, that although they can find no misconduct on the part of the parent, they will not permit that to be done with the child which a wise careful and affectionate parent would not do".

An example of the exercise of this jurisdiction is the case of In re Gilbert (an infant)<sup>6</sup>. There a child, at the age of two and a half, was placed by her parents in the custody of an uncle and aunt. She spent the next ten years in their custody with only occasional periods in the care of her parents. During the relevant period she was fully maintained by the former. The parents sought custody by a writ of habeas corpus. The child had no wish to return to them. Chapman J. held that under all the circumstances it would

not be in the best interests of the child for her to return to the care of her parents. The father's right was not to be lightly set aside, but the question was whether the application of the parents would promote the welfare of the child.

It is against this background of common law and equity that the statutory jurisdiction of the Children's Court must be exercised. The latter is a creature of statute and has only the powers conferred upon it by the Act<sup>7</sup>, whilst the ancient common law and equity jurisdiction is exercised by the Supreme Court, not the Children's Court. For the Children's Court to interfere between parents and their children the standards of neglect must be such as to come within the statute. In Neal v. Colquhoun evidence was given that the children were living in filthy conditions. Evidence also established that both at home and abroad, the parents failed to exercise sufficient control. Living conditions were inadequate, sleeping conditions crowded, three children sharing the same bedroom as the parents. The Special Magistrate found that the children were neglected and his decision was affirmed by the Supreme Court on appeal. There had, in this case, been the usual lead-up to prosecution for neglect. For some time officers of the Children's Welfare and Public Assistance Board had been visiting in an attempt to correct the situation and make the parents and children self-adequate by social work means. Although some temporary improvement was achieved, it was too short-lived to be of any value.

Neglect is the failure to take such steps as would be taken by a reasonable parent for the benefit and welfare of a child<sup>8</sup>, and so, it is submitted, would include a course of ill-treatment or exposure. A parent who allowed his infant to be left at his door by his wife from whom he was separated, where it remained for six hours becoming stiff with cold would be an unfit parent<sup>9</sup>. A mother who wrapped a baby in a shawl, padded it in

shavings and then sent it by train to the father's lodgings would likewise be an unfit guardian, even though the baby was unharmed<sup>10</sup>. There need be no intention to inflict physical injury<sup>11</sup>. Any child within either of these categories would, it is submitted, be a neglected child. Section 31 (2) of the Child Welfare Act provides that proper care and guardianship shall be deemed not to have been exercised where a child is not provided with "necessary food, lodging, clothing, medical aid, or nursing, or if he is neglected, ill-treated, or exposed".

On the other hand, however, there is another type of case where a child may be dealt with by the Children's Court even though he is not charged with an offence nor neglected. This is the case of the child who is beyond the control of his parents or guardians and is dealt with under s. 33. Where a child is brought before the Court as uncontrollable, the Court has the same powers of disposition as in a case of neglect, except that it may not require the parents to enter into a recognizance. An uncontrollable child may then be placed under a supervision order or declared a ward of the State.

The notion engendered by the term "uncontrollable" is different from that of neglect. A neglected child is in no way responsible for his state and his conduct has not been the cause of intervention by the Court. The same, however, cannot be said of an uncontrollable child. There, it is the child's behaviour which creates the ground for intervention. A child is uncontrollable when those responsible for his care cannot control his behaviour. Though that is not to say that a child will be regarded as uncontrollable because of isolated acts of disobedience or because he is disobedient in a situation where such can be expected of a normal child. A course of bad behaviour is necessary to constitute uncontrollability. In Skeer v. Byrne<sup>12</sup> the Full Court of the Supreme Court of South Australia held that a girl of sixteen was beyond control when she withdrew herself from her parents

and refused to live at home having directed all her feelings and attentions towards a man. There was no reason to believe that any impropriety had occurred but it was a persistent course of conduct contrary to the wishes of her parents where disobedience was not to be expected. She was, therefore, considered to be uncontrollable. On the other hand, in the case of Hawkins v. Hawkins<sup>13</sup>, a father charged his sixteen year old son as being uncontrollable. The boy was apprenticed in a trade and living with an aunt. The Magistrate found that he had left home and refused to submit to the father's control. Apart from that he was well-behaved and not beyond control. The complaint by the father was therefore dismissed by the Magistrate, a decision which was upheld by the Full Court. Therefore to enable the Children's Court to make an order against a child brought before it pursuant to s. 33 then a course of disobedient conduct must be established.

The procedure followed by the Court in cases of neglect and uncontrollability is the same as in cases of delinquency. In these cases the report of the child welfare officer is of even greater importance. Usually there will have been a history of attempts by the Social Welfare Department and other agencies to work on a voluntary basis, which has manifestly failed. Young children taken into care as a result of declaration as wards are mostly placed in long term care. The Director becomes their guardian, and the placement is within his discretion. Suitable children may be located in foster homes although they cannot be offered for adoption unless the necessary consents are obtained<sup>14</sup>.

### Conclusion

In conclusion, it is submitted that it would be more appropriate to charge the parents, or those responsible for the neglect, rather than the child. Although the child, particularly if a mere infant, may be blameless of any culpable act or omission it is against him that the complaint must

be laid. Thus he is put on the records of the Court and the Police Department as a defendant. Although the objective of the jurisdiction is that of guidance, it is unlikely that such a record will be seen in that light either by the child in later years or by a prospective employer. Not infrequently, applicants for employment are asked by standard-form employment application forms if they have been found guilty of a Children's Court. To answer in the affirmative may easily demolish any prospect of employment with that employer. A singularly unfortunate result where the so-called offence was a parent or guardian's neglect.

NOTES

1. 1944 S.A.S.R. 119
2. 1959 S.R. (N.S.W.) 271
3. Child Welfare Act 1960 (Tas.) s. 4  
Guardianship and Custody of Infants Act 1934 (Tas.) s. 18  
Adoption Act 1968 (Tas.) s. 11  
Matrimonial Causes Act 1959 (C'wealth) s. 85 (1) (a)
4. (1878) 10 Ch.D. 49, 71-72
5. 1893 2 Q.B. 232
6. (1913) 15 G.L.R. 631
7. Clarke Hall & Morrison on Children 7th Edn. Page 3
8. R. v. Senior 1899 All E.R. Rep. 511
9. R. v. White 1871 L.R. 1 C.C.R. 311
10. R. v. Faulkingham 1870 L.R. 1 C.C.R. 222
11. R. v. Williams (1910) 4 Cr. App. R. 89
12. 1929 S.A.S.R. 378
13. (1940) 42 W.A.L.R. 86
14. Adoption Act 1968 (Tas.) ss. 21 - 28 inclusive

CHAPTER 5A JUVENILE PANEL AS AN ALTERNATIVE TO THE COURT.

The juvenile court system in Scotland was fully reviewed by the Kilbrandon Committee<sup>1</sup> which was appointed in 1961 and presented its report in 1964. It was found by the Committee that the existing system of Scots juvenile courts was based essentially upon an educational principle. It was considered by the Committee that the aim of any programme for dealing with young offenders must be to strengthen the natural influences for good which assist in development. Of these influences, the most important was the child's home for whatever the legal terminology might be employed, any rehabilitative measures would always imply close co-operation with the parents. A principle which should apply the Committee said, not only where the child is living at home but where he is removed into residential care. This principle of co-operation with parents was fundamental to the Committee's approach to its task.

Necessarily, the function of the Court must be two-fold. First, the finding of the fact of guilt or innocence which is an ordinary judicial function, involving a consideration of the evidence and the application of judicial technique. The issue is simply whether there is sufficient evidence to support a finding of guilt. Second, the Court must pass sentence consequent upon a finding of guilt. In this function, the Committee said, that there had been an increasing tendency to adapt the sentence to the child rather than the crime.<sup>2</sup> The notion of educating the offender is much more prominent than in the past and is receiving increasing attention. These two concepts, of treating an offender and punishing for a crime, whilst not always incompatible often, as has been observed, militate against each other.

In the first place, the idea of criminal responsibility crime prevents the application of preventive measures to potential delinquents. Because of

the requirement that a criminal must be found to be personally responsible for his actions, no person who has not been found guilty of an offence may be subjected to the same treatment as an offender. Second, punishment may be applied only to the offender: those in immediate contact with him and whose attitudes may have affected him, such as parents, will not be the objects of punishment for an offence they did not commit. Third, the offence may be of a trivial nature but, at the same time, symptomatic of a grave disturbance which needs long-term treatment. If the crime and the punishment are to be regarded as correlative, then necessary treatment cannot be applied. Finally, of course, once the punishment has been decided and the order made, it may not be subsequently altered. In the fullness of time, the needs of the offender may become better understood but the course of treatment, once determined by the Court, is final. It is well recognised that the welfare of a child is the paramount consideration in many areas of statute law relating guardianship and custody. Even at common law, youth was regarded as a mitigating factor in punishment. Accordingly, the dichotomy of function of a criminal court is even more pronounced in the juvenile jurisdiction.

Action in regard to child offenders was entirely dependent upon establishing the commission of an offence by the usual means. The Committee was of the opinion that if society was prepared to permit sustained measures of education and training for children then the initial basis for the intervention should be established beyond doubt in the first place. That is what the criminal procedure aims to do.<sup>3</sup> If the facts (i.e. the offence) are disputed then they should be determined in the ordinary judicial way. No other procedure would be acceptable. But this determination is an entirely different function, and calls for different skills, from the function of deciding what action should be taken once the offence is proved. As a matter of practice, the criminal function dominates the whole proceeding.



Even if the function of the Court on sentence is to consider the future and welfare of the child, the intention is likely to be misunderstood. It is an order made by a Court, and is therefore construed as punishment for a crime.

These were the considerations that lead the Kilbrandon Committee to a frank recognition of the dichotomy in the juvenile jurisdiction and to the conclusion that they should be clearly separated. Since approximately 95% of children plead guilty, the purely judicial role is limited and in the light of this fact it was possible for the Committee to suggest that juvenile offenders should be brought before a specialized agency whose only role would be the decision as to the course of treatment. The child, in the presence of his parents, would be asked whether he agreed that he committed an offence (equivalent to a plea of guilty in a Court). If the child agreed that he had done the act then the agency would proceed. In the event that the child denied the offence then the case would be referred to the Court for determination of whether he was guilty or innocent. If the Court found him guilty, he would be referred back to the agency, which would then proceed to plan a programme of treatment. The agency would have no concern whatever in the determination of questions of fact. It would be concerned only with the treatment of children referred to it. Such an agency would exercise its jurisdiction on the basis of facts admitted by the child or upon a finding of guilt by the Court. It would consider the background of the child, and plan a course according to his needs. The needs of the child would be the only criteria.

"Such an agency clearly would not be a criminal court of law, or indeed, a court in any accepted sense. It would be the duly constituted public agency authorised to deal with juvenile offenders, where necessary by the application of compulsory measures. Within the

ranges of measures authorised by law, it would have the widest discretion in their application appropriate to the needs of the individual child, who would thereafter remain within its jurisdiction for as long a period as was judged to be necessary, subject to whatever upper-age limit might be fixed by statute. During that period the agency would have the widest discretion to vary or terminate the measures initially applied, and where appropriate to substitute others."<sup>4</sup>

This agency was referred to by the Committee as a panel. It would be a completely independent body, consisting of persons appointed from a list for each geographical area. Members would not be appointed because they held some specific professional qualification or were members of the local authority but would be appointed only because of their personal qualities and because they had a special understanding of the needs of children. The panel would therefore be a lay panel, not a panel of experts and each panel would consist of three persons.

For the panel to come to a decision in the light of the child's background and needs and to exercise continuing guidance up to the statutory age limit, it is clear that it must have a reliable and expert source of information. It was envisaged by the Committee that the panel would be supported by an executive agency which, under the control of a Director responsible to the panel, would report to the panel upon the background of the child (that is, it would provide a full social history, together with a recommendation as to the course of action most appropriate) and would have the responsibility of supervising the cases for which the panel had initiated a course of treatment. This executive agency would be staffed by professionally qualified personnel and would provide an expert social work service.

It is interesting to note that the Committee favoured the submission of recommendations to the panel. Vested in the Director of the executive agency would be a discretion to refer back to the panel a child for whom the measures were not succeeding. It follows that, in this way, the panel would have continuing supervision over all courses of treatment. The first decision of the panel is likely to be that special education measures are required, in which case the child would become subject to the supervision of the panel through the Director. If necessary, the panel may make additional orders to the effect, for example, that the child should be placed in residential care but even in that case the responsibility would remain with the panel. Any decision as to the future of the child in care would be made by the panel following reports by the Director. For the scheme to be successful, the executive agency must to maintain close and expert contact with the child so that the necessary reports may be furnished. Essentially, the notion is that responsibility is always vested in the panel but it will depend heavily upon the support of the agency for the necessary information. The panel has the power to vary or discharge a programme, but the process is long-term, subject only to any upper age limit that may be fixed by statute. Unless this sustained supervision is accepted, the notion of the panel as envisaged by the Committee could not operate.

It is not every case that should be referred to the panel. Some discrimination is necessary in deciding which cases to refer. In some cases, a simple warning may be sufficient to induce caution in the child and his parents. On the other hand, the offence may be of a trivial nature, but at the same time the manifestation of some disturbance that needs immediate attention if the behaviour of the child is not to deteriorate. Indiscriminate referrals should not be encouraged. Ideally, the only children to come before the panel should be those in need of some kind of assistance that the panel

can provide. Referrals, then should only be through some specialised agency. Referrals would be by a reporter, the equivalent of a public prosecutor. Any referral would be the decision of this officer. He would work in close co-operation with the welfare and educational services but the decision to refer a case to the panel would be his alone. In reaching a decision he would refer to the needs of the child as he is aware of them, together with any questions as to the public interest, and whether there is sufficient ground for the belief that the child has committed an offence. These functions are, in many ways akin to those of a public prosecutor. But they are wider. The most important consideration for the reporter is deciding whether it is in the interests of the child that he should be brought before the panel. All reports from police and other bodies that a child is guilty of an offence or in need of care and protection would be made to the office of the reporter. Private institutions or individuals would have no status to refer a child to the panel.

In addition to the referral function, the reporter would have another role as legal adviser to the panel. He would be responsible, where the child denies his guilt, for the prosecution of the case before the Court. It would be the reporter, too, who would represent the panel before the Court when any of its decisions as to treatment came under challenge pursuant to the general right of appeal recommended by the Committee.<sup>5</sup> The cases would be presented to the panel by the reporter. This would be a simple procedure, merely a recitation of the facts, and the recording of the decision of the panel.

Of the essence of the Committee's proposal is that the procedure of the panel itself should be simple. The referral should in each case simply be a brief statement of the facts involved. The reporter should notify the parents of the time and place of the hearing. It was considered essential that the

parents should attend. Insofar as possible, both parents should be present, and in appropriate cases the panel may adjourn to enable the attendance of the absent parent. Early in the proceedings the grounds of the referral should be explained and if disputed stayed for referral to the Court. Subject to this consideration rules of procedure should not be laid down. The work of a panel would be done most effectively in an atmosphere of unhurried discussion so that the aim and intention may be made known to the child and the parents and in many cases it may be possible to obtain the co-operation of the parents at the outset. In such circumstances, it may not be necessary for the panel to make a formal order. An atmosphere of simplicity and dignity is most appropriate to the fulfilment of the aims of the panel concept. Large and formidable gatherings of people should be avoided. The proceedings are closed to the press and public.

In supporting such measures the Committee was fully aware that legal problems would arise in individual cases. To resolve the question whether the referral was justified in point of fact, there would be machinery for this issue to be determined by the Court. Only if the case were referred back to the panel after a finding of guilt would the panel proceed. The determination by the Court of the issue of innocence or guilt would be an ordinary judicial proceeding. In addition, however, there is a more general problem about decisions by the panel. In no sense is the panel a Court, but in many cases it will have the power to completely dominate the life of the children who are referred to it. If the panel decides to frame a programme for a child to be treated at home, the parents may be prepared to assent. On the other hand, the same assent may very well be withheld if the panel decides that the child should be taken into care. Such a decision may be for the child's benefit, but that leaves unanswered the fundamental question whether he should have been so removed without a proper determination by a Court. After

all, he would be under the control of the panel until the upper age limit fixed by statute. The deprivation of liberty could therefore be for a long period. As the committee itself said<sup>6</sup> : -

"Such disputes will not, of course, involve any legal issue of fact, the question simply being whether the measures ordered in all the circumstances are warranted in the interests of the child, or whether they amount to an unjustified interference between parent and child amounting to an unwarranted infringement of individual liberty".

Issues such as these are disputes between individuals and public bodies and as such the only acceptable way of resolving them is a judicial determination of a Court. To this end, the Committee was of the opinion that all decisions of the panel should be subject to appeal to the Court. Such an appeal should relate both to questions of law and the appropriateness of the panel's decision. An appeal may be instituted by the parents at any time during the continuance of the programme.<sup>7</sup>

Generally, the basis upon which children would become subject to the intervention of the panel would be that they have special needs of social education and training. To state the approach is to raise the problem of defining a child in need of education and training. An abstract definition seems almost impossible and the Committee adopted the expedient of defining a child in need of social education in terms of tangible criteria. The statutory definition of a child in need of care and protection may be difficult to apply. The definition, in the Children and Young Persons Act 1937 (U.K.) was in these terms :-

"(a) child or young person who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is falling into bad associations or exposed to moral danger or beyond control.... and who, in any such case as aforesaid, requires care or protection."

There are two elements in this definition. First, the facts postulating the need for care and protection and, second, the failure of the guardian to exercise proper guardianship. In some cases it may be very difficult to show that, say, a persistently absconding teenager is absconding because of a lack of control by the parents. The fault and responsibility may well be entirely upon the teenager. If the criterion is to be the needs of the child, then those needs alone should be considered. Lack of parental control should not be part of the definition and should not have to be established. Another pointer to the need for intervention may be the constant failure of a child to attend school, which may often be the earliest manifestation of some more deeply seated problem of social adjustment. In every case, the paramount consideration should be the needs of the child. Any child prima facie in need of assistance should be referred to the panel and having regard to this broad principle, the Committee considered that the panel should assume jurisdiction where all or any of the following circumstances are seen to apply. Namely, where the child is<sup>8</sup> :-

- (a) falling into bad associations or is exposed to moral danger;
- (b) subject of criminal neglect or an offence;
- (c) in breach of the criminal law;
- (d) failing to attend school;
- (e) beyond control;
- (f) in the case of a parent who had abandoned him or who is suffering from some permanent disability rendering him incapable of caring for the child, or who is of such habits or mode of life as to be unfit to have the care of the child.

These then are the basic criteria upon which referrals to the panel would be made. When these symptoms are considered to exist, the reporter would make a referral to the panel. It would not be the function of the panel, then, to determine the facts constituting the grounds for the referral. Only one issue would arise for the attention of the panel, that is the assistance, if any at all, needed by the child. The panel would look only to welfare, not to the determination of issues of fact.

It is of interest to note that the Committee was of the opinion that the only cases, by and large, that should come before the panel would be those in need of care and education. To avoid trivial cases, in need of warning only, police warnings should be given when appropriate. The reporter to the panel would, in co-operation with other community agencies, refer only the cases where some form of continuing programme was indicated. In no sense should the panel become a mere forum where otherwise well-adjusted children would be warned.<sup>9</sup> This policy is in marked contrast to the attitude that all offences, no matter how isolated and trivial, should be dealt with by the law. To ensure that this policy would be carried into effect the Committee envisaged that the police, the reporter to the panel and the Director would work in close association, both on matters of policy and day-to-day administration.<sup>10</sup> Only the cases requiring some form of attention, would, by and large come before the panel.

In respect of the cases referred the panel would have a wide and flexible jurisdiction. For example, the panel might leave the child in the custody of his parents and make him subject to supervision. The supervision order may contain such conditions as are deemed necessary by the panel, but they should be adapted to meet the specific needs of individual cases. Attendance at a training centre may be a condition of a supervision order.<sup>11</sup>



Other cases may require more drastic treatment and, in respect of these, the panel may order the child's removal from home either to the custody of a fit and proper person, the equivalent of a foster parent, or to the care of the local authority. In all cases where the child is removed from home, the legal custody vests in the panel. The Director has the role to supervise the programme of the panel and to report developments. However, the child is in the custody of the panel and all decisions are made by the panel.<sup>12</sup> In addition to these powers, the Committee envisaged that the panel would have some other powers of lesser importance. These would be the power to require a recognizance from parents,<sup>13</sup> to issue a warning to the child and his parents<sup>14</sup> or, simply, to take no action at all<sup>15</sup>. If the preliminary sifting measures operate effectively these latter powers should be used rarely, if indeed at all. The aim of careful preliminary sifting is that the panel should not be called upon to adjudicate upon trivial formal matters which do not indicate the need for any form of social intervention. Emphasis is changed from the notion of securing a conviction in respect of every small misdemeanour, to intervention only in those cases where it is required for an adequate reason.

It was hoped by the Committee that, in most cases, it would be possible to secure the co-operation of the parents on a voluntary basis so that the panel would not need to proceed to issue a formal order. That is not to say though that it cannot apply compulsory measures. However, such powers would be invoked only where voluntary means had failed. The exercise of the voluntary function was considered to be germane to the concept of the panel.

Juvenile Courts Act 1971 (South Australia).

South Australia has accepted the proposals of the Kilbrandon Committee, and set up, under the Juvenile Courts Act 1971 a panel along the lines suggested in the report. Supporting social work and field services are provided under the Community Welfare Act 1972. The Juvenile Court has not been abolished, and parents may at any stage request that proceedings be transferred to the Court. However, it is clearly envisaged that by far the majority of cases will be disposed of by the panel.

As with most other legislation in regard to children, the interests of the offender shall be the paramount consideration. Section 3 of the Act provides that to achieve this objective the Court or a panel in exercising the powers conferred by the Act shall adopt a course that is calculated to

- (1) secure for the child the care guidance and correction as will promote his welfare and the public interest; and
- (2) conserve and promote the family unit. A child shall not be removed from the care of his parents, except where his own welfare or the public interest cannot be otherwise adequately safe-guarded. This is the overriding intention of the statute, and all the powers conferred by it shall be exercised with that objective in view. The Act gives the panels jurisdiction over children who are less than sixteen years of age or were less than that age at the time of the offence. Where a child is subject to the jurisdiction of the panel he shall not be charged with an offence. A complaint may be laid that he is in need of care and control but such a complaint must also allege the commission of an offence (s.8). Where a child who is alleged to have committed an offence, or who is alleged to be uncontrollable or an habitual truant, and has not been arrested, no complaint may be laid but a report shall be made to the panel. The report shall allege the offence, and the panel may proceed to deal with the child (ss. 3 (3), 8 (4)). If the child is

arrested and appears before the Court, then the Court may either hear and determine the complaint or it may adjourn the case to be dealt with by a panel. (s.8(6)). In the event that the Court adjourns the case for the panel, then, upon receipt of a report from the panel the Court may dismiss the complaint or allow it to be withdrawn or, if the matter has been referred to the Court by the panel, it may hear and determine the complaint. (s.8(8)).

As already mentioned, the panel has not displaced the Court, and there are some circumstances where the panel must refer a case to the Court. Under s. 12(1) the panel must refer to the Court any matter where :-

- (1) the child does not appear before the panel after having been requested to do so;
- (2) either the child or his parents request that the matter be referred to the Court, at any stage of the proceedings; or
- (3) if the panel is of the opinion that the case should be referred to the Court because of the gravity of the offence, or it is expedient in the interests of the child and the community that the matter should be so referred.

The panel shall also refer to the Court a case where a parent does not attend the hearing in company with the child. (s. 12(2)). It is obligatory upon the panel that the child and his parent be informed of the right of referral to the Juvenile Court.

At the time a matter is referred to the panel, the investigating police officer or the Director-General (of the Department of Community Welfare, which is independent of, but provides executive and field work services for the panel) shall cause a report to be sent to the panel. In addition to details of the offence, the report shall include particulars of the child's social background and personal circumstances. (s.13(1)). Such a report, prepared at that preliminary stage by, say, a police officer, may well be

incomplete and inadequate for the purposes of the panel. It is of the essence that the panel should be fully informed and so it may request the Director-General to supply such further information or reports as may be necessary or desirable for the complete consideration of the case (s.13(2)). Having obtain such reports as are necessary, the panel has quite an extensive range of powers for treating the child. These powers are set out in s.14 of the Act, and are as follows :-

- (1) the delinquent and his parents may be warned or counselled;
- (2) the panel may request the child to undertake, in writing, that he will comply with such directions as may be given by the panel as to any training and rehabilitative programme to be undergone by the child;
- (3) the parents may be requested to give a written undertaking to comply with any directions by the panel to assist the child in any such programme;
- (4) the panel may refer the case to the Juvenile Court if the child or a parent refuses to give any undertaking requested by the panel or if it is thought otherwise expedient for the purposes of the child's rehabilitation.

Section 14(2) provides a further power of referral to the Court. That is where an undertaking has been given as requested but has not been observed within six months. Upon the referral of a matter to the Juvenile Court by the panel, the panel or a member thereof shall lay a complaint alleging that the child is in need of care and control, is an uncontrolled child or an habitual truant, as the case may be (s.15(2)). The Court shall then hear and determine the complaint. It may receive a report from the panel as to the proceedings there, but only after it has made a finding on the complaint. Any report the panel may submit to the Court shall be taken into account in

respect of sentence only. (s.15(5)). To ensure that the separation between the Court and the panel is physically obvious, it is provided by the Act that a panel may not sit in any building which is also used as a Court.

The Act also creates a Juvenile Court. This is a Court of summary jurisdiction and is constituted by a judge, special magistrate or special justices. A panel of persons considered competent to constitute the Bench is prepared, and the appointees are chosen only from this list.<sup>16</sup> As the Juvenile Court is created as a Court its procedure is appropriate to a Court of law, but it has an extended range of options as to sentence so that the interests of the child may be cared for. Again, as the object of the jurisdiction is the rehabilitation of the offender as a member of his family and the community, the Court has the power to order the attendance of a parent at the hearing of a complaint. Proceedings may be adjourned to enable such attendance to be procured.<sup>17</sup>

It is incumbent upon the Court to ensure that the child understands the proceedings against him. Section 34 provides that where a child is not legally represented, the Court shall satisfy itself that he comprehends the proceedings. If he does not, then the Bench should, in simple language, explain the proceedings. This is an attempt to overcome the communication problem between the Court and a backward child or a child to whom legal proceedings are unknown. However, communication with a child is a difficult task and, for the procedure to be effective, the Magistrate would need to be a person of appropriate skill in child communication. It may be more realistic perhaps, for the explanation to be carried out with the assistance of a child psychologist, in the same way as interpreters are used for persons who have an insufficient grasp of English. The Court will then proceed to determine the facts in the ordinary judicial manner.

If the child is found guilty, the Court shall be fully informed as to his background before disposing of the matter. It may order him to attend

an assessment centre established under the Community Welfare Act 1972 so that he may be examined and an assessment made as to his personal circumstances and social background. The report shall recommend the most appropriate means of rehabilitation. In addition, the Court may order such other reports and examinations as it deems fit and may consider and act upon any such reports in relation to the sentence. However, before passing sentence, certain aspects of the report may have to be disclosed. First, so much of the content of the report as is detrimental to the defendant shall be made known to him if he, his parent or legal representative so requests. Second, the child, or his parent or legal representative shall, if they so request, be given the opportunity to cross-examine the person who prepared the report and the Court shall procure the attendance of such person for that purpose. This duty to reveal the contents of the report is subject to the discretion of the Court to order that it shall not be revealed if it is of the opinion that to do so would be prejudicial.<sup>18</sup>

This is the legislature's solution to the problem discussed in Chapter 2 of the dilemma involved in the revelation of reports to children and parents. It is the contents which are to be revealed, not the report itself, and then only upon request by the defence. This is basically the approach adopted in the Model Penal Code (U.S.A.). From a judicial stand point, the liability of the reporting officer to be cross-examined, may be of some importance. One of the problems in dealing with welfare reports is the assessment of their reliability and, hence, it should be adequately tested by the cross-examination of the welfare officer. It is still, though, only in the cases where it is requested by the child or his parent that any such assessment of the report will occur. One would suspect that the proportion of cases where such requests are made would be quite small.

When a complaint is made against a child, it must allege that he is in need of care and control but must. allege that the child has committed an

offence in addition. The first task of the Court is to determine that allegation and, if it is satisfied that the child has committed an offence, then proceed to hear the complaint that he is in need of care and control. Upon being satisfied, on the balance of probabilities, that he is in need of care and control the Court will find that the complaint has been proved. There are then two stages in the hearing: first, the determination of the offence and, second, the determination of the issue of whether the defendant is in need of care and control. It is this latter which need only be proved on the balance of probabilities. In fact, relaxation of the rules of evidence goes still further. Section 42(d)(1) provides that when the Court is hearing the care and control allegation it shall not be bound by the rules of evidence, any evidence which in the opinion of the Court will assist, may be admitted. Under s. 42(a)(11) the Court is required to determine the allegation having consideration to the best interests of the child. This seems to be a paradoxical formula. The Court cannot determine what evidence is in the best interests of the child if it does not know what his best interests are. This is something that cannot be known until the evidence has been heard and the issue determined. Yet the best interests of the child are to govern the admission of evidence.<sup>19</sup>

No conviction is to be recorded against a juvenile defendant if the care and control allegation is proved. The course to be adopted is that required by the welfare of the child, a number of courses of action are available to the Court :

- (a) The complaint may be dismissed and the defendant discharged.
- (b) He may be required to enter into a recognizance, which may be conditional. There may be a condition that the child be under the supervision of an officer of the Department of Community Welfare and that he shall obey any directions given by that officer.

It may also contain a condition that he attend a youth project centre set up under the Community Welfare Act 1972 at such times as may be stipulated.

These are two of the facilities provided under the Community Welfare Act 1972, which operates in conjunction with the Juvenile Courts Act 1971. In addition to these, though, the Court may include any other conditions it considers necessary.

(c) Finally, the Court may order that the child be placed under the care and control of the Minister. The period shall be for not less than one year, but shall expire on the offender's eighteenth birthday.

Each course will be that considered by the Court to be in the best interests of the child. The Court must have the benefit of a report from an assessment centre before a child is placed under the care and control of the Minister or is required to attend a youth project centre.<sup>20</sup> This report ensures that each child is dealt with in the most appropriate way. It is to be hoped that Departmental procedures do not become stereotyped so that this intention is frustrated by standard recommendations for each type of case.

An important power given to the Juvenile Court is the power to vary its recognizances. The time limit for a recognizance is two years.<sup>21</sup> On the application of the Director-General, or of the child or his sureties, the Court may vary the conditions, or, if the child's conduct has improved, the recognizance may be discharged. Conditions with regard to a child may change considerably before the expiration of a two year bond. If his conduct has improved, there is nothing to be gained by making him subject to conditions that are inappropriate and unnecessary in the new circumstances. Power to vary may of course be used the other way. Where a child has failed to respond to a recognizance, the Director-General may make an application to



vary the recognizance in such a way as to deal with the specific areas of misconduct. In such a case the defendant must be given reasonable notice and the opportunity to call evidence. A similar opportunity shall be afforded any surety.<sup>22</sup> Where there has been a breach of the recognizance, the Court may issue a warrant for the apprehension of the offender, may make an order declaring that the recognizance has been forfeited and proceed in any way it could have when he was originally sentenced. The Court has the power to make an order for the payment of any amounts due and payable under the recognizance. There are, then, two ways whereby the Court may compel compliance with its directions. In the first place the conditions of the Court may be varied so as to deal with certain aspects of the child's behaviour not originally covered, or that may have developed since the imposition of the recognizance. Second, if that does not have the intended effect, the Court may then take the next step by declaring the recognizance forfeited.<sup>23</sup> Then the Court is at large and may make any order it could have made at the first hearing: that is, it may impose any other order at all that it is given power under the statute to make. If a recognizance has failed to have the necessary effect, then presumably the Court would order that the child be committed to the care and control of the Minister. A Court may, in any event, order a child into care and control of the Minister only if it is constituted by a special Magistrate or judge and, hence, a Court composed of justices only may not order a child to be placed in the care of the Minister.<sup>24</sup> In view of the drastic nature of the action of removing children from home, the statute recognises that it should be done only by a Bench sufficiently qualified to fully assess all the behavioural factors involved.

Part VI of the Act makes provision for the disposal of children found to be neglected, uncontrollable or habitual truants. If the Court finds

proved a complaint that a child is neglected or uncontrolled then it has a discretion to place him under the care and control of the Minister. The order shall be deemed to have effect until the child reaches the age of eighteen years. Also set out in the statute are the criteria to be used by the Court in deciding whether to place him under the care of the Minister. Section 54(4) provides that the Court

"shall consider the welfare of the child and the desirability of removing him from his existing social environment and, in the case of an uncontrolled child, shall not make any order until a report on the child has been made by an assessment centre".

It thus seems to follow that there is no such necessity for a report if a child is found to be neglected. In order that the Court may be more fully informed as to the order it should make, there is provision for the case to be adjourned for up to three months, during which period the child will be placed under the care of the Minister. When the offender comes before the Court, following the adjournment, the complaint may be dismissed or withdrawn if satisfactory arrangements have been made and he may be said to be no longer neglected or uncontrolled. If the child is still in need of care and control, then he shall be committed to the care of the Minister.<sup>25</sup>

Before such an order is made, notice shall be given to the parents or guardians, unless their whereabouts are unknown.

It is to be noted that these provisions, made under s. 57 of the Act, apply only to neglected and uncontrolled children. The use of the term "uncontrolled" is interesting. What would be the situation if, in fact, the parents had exercised all efforts to control the child, but he had failed to respond? After all, the parents had exercised control, but without response. It is not entirely clear from the Act whether such a child would come within the purview of the statute or not. Also of interest is the fact that the

Act confers a discretion to place the child under the care and control of the Minister.

How an habitual truant is to be dealt with is also set out in s. 57 which provides that he will be dealt with in basically the same way as a child under s. 56. However, where it is decided that the child should be placed in the care and control of the Minister, the upper time limit shall be the age where he is no longer legally required to attend school rather than the age of eighteen years. Except for this qualification the procedure for the two classes of children is the same.

As in the case of complaints alleging that the child is in need of care and control in that he has committed an offence, a complaint alleging that he is neglected, uncontrolled or an habitual truant shall not be a complaint charging the commission of an offence and the child shall not be convicted of an offence.<sup>26</sup> In hearing the complaint, the Court will not be bound by the rules of evidence. Evidence may be admitted which, in the opinion of the Court, will assist it to determine the complaint in a manner which appears to be in the best interests of the child. The complaint shall be determined in the same manner<sup>27</sup>. This is the same paradoxical formula as is found in the provisions relating to the determination of complaints for care and control where an offence has been alleged and seems to involve some pre-judgment of what the child's best interests will be. It is submitted that the decision cannot be made until the evidence has been heard.

In proceedings in respect of neglected and uncontrolled children and habitual truants, the Court may receive as evidence, and take into consideration, a report from a member of the police force or an officer of the Department of Community Welfare. The contents of the report shall be made known to the child or his parents, or his legal representative. As with reports for children who have committed offences, the officer who prepared

the report may be cross-examined. There is a discretion to withhold disclosure if in the opinion of the Court it would be harmful<sup>28</sup> to the child. It would appear though that there is no necessity for the disclosure of the contents of the report to be requested by the defence. Under the Act, the Court has the duty to disclose the contents. This is interesting when compared with the duty to disclose the contents of reports for complaints where children have committed offences. In these latter cases, the defence requests that the contents of the report be disclosed. Any reason for the distinction seems difficult to comprehend.

In addition to the power of the Court to vary the conditions of a recognizance under s. 46, s. 66 confers a more general, but still limited, power on the Court to vary any of its determinations. Under that section, where the Court has found a complaint proved and has made an adjudication, it may review the order if an application is made within a month of the determination. Upon such a review, the Court may confirm, discharge or vary the original order. Application for such a review may be lodged by the person against whom the order is made: that is, the child, a parent or guardian of the child, the complainant or informant in the original proceedings or, finally, by an officer of the Department of Community Welfare. When reviewing an order in this way, the Court has jurisdiction only to do what it could have done when the case was first heard. There is an additional power conferred on the Adelaide Juvenile Court by s. 65. That Court may reconsider an adjudication by any juvenile court upon application by an officer of the Department, even though it is not made within the month prescribed. Such a power could have considerable value. It may well be that, in the course of time, an order made by a Court could become inappropriate because of altered conditions. This is unlikely to happen within the course of a month, but over a few months quite major changes may occur in circumstances. A power in

the Court to vary or discharge its order in the light of changed conditions could have important consequences. An order that could become inappropriate may be amended so that it is relevant to the child in his conditions as they exist.

The Community Welfare Act 1972 (S.A.)

It is intended that the social and executive work of the panels and the Court shall be performed by the Department of Community Welfare. This Department is created by Community Welfare Act 1972. Under the control of a Director-General, it is responsible to the Minister for Community Welfare and it is that Minister who has been referred to in the discussion of the Juvenile Courts Act. The Department has a staff of social workers and welfare officers and it is the responsibility of these officers to provide the necessary reports to the panels or the Court, to carry out any assessments that may be required and perform social work supervision.

The objectives of the Act are set out in s. 7. They are, fundamentally, to promote the well being of the family, individuals and sections of the community by assisting them to overcome social problems. Family life is held to be the basis of community life and it is an object of the Act to reduce the incidence of family disruption and mitigate its effects when it does occur. The Department is to assist voluntary agencies and to collaborate with other Departments for the achievement of these objectives. Research and interest in community problems are to be promoted. It is notable that these objectives are those of an independent department and in no way is the department responsible to the panel or the Court as envisaged by the Kilbrandon Committee. Although the department has a wide general responsibility for community problems, this thesis is concerned only with the department's role in providing social work services to the panels and the

Court. However, the above objectives are relevant to this issue, because they are the objects the department aims to achieve in the administration of programmes for the panels and the Court. In these matters, the department has the primary responsibility although the Court does have an important, if limited, appellate role. The fundamental principle upon which the department is to operate is again the welfare of the family. Another interesting point about the Act is that it speaks in terms of the welfare of the family, not of the individual child who is before the panel or Court. Usually welfare legislation speaks in terms that the welfare of the individual child shall be the paramount consideration. This principle seems, at least in language, to have been widened to include the whole family. Indeed this is explicitly provided by s. 37, the first section of the division dealing with family care services. S. 37 is as follows :-

"The administration of this Part by the Minister and the Department shall be founded upon the principle that the welfare of the family is the basis of the welfare of the community, and should be protected and promoted as far as may be possible."

To carry out this policy the Minister may provide such substitute and supportive care and guidance as may protect or promote healthy family relationships. In fact the Act empowers the Minister to provide :-

- (1) family counselling services;
- (11) supervision and counselling for children, either voluntarily or under the Juvenile Courts Act;
- (111) psychological, psychiatric and medical services for children who are under care and control;
- (1V) adequate care and guidance of children who are separated from their families, for any reason at

all. He shall ensure that they receive the benefit of a healthy and balanced family environment.<sup>29</sup>

These are the basic principles through which the Department puts into effect the programmes proposed under the Juvenile Courts Act. If a child gives an undertaking to submit to supervision pursuant to the suggestion of a panel, then these services may be provided by the Department voluntarily. If he accepts a period of care in the custody of the Minister, the latter may care for him as being separated from his family. On the other hand, the facilities under ss. 39 and 40 may be utilized. If, on the suggestion of a panel, the parents agree that the child is in need of care and control they may apply to the Minister under s. 39 for the child to be accepted into care and control. If the Minister is satisfied that otherwise the child might become neglected or uncontrolled, he may, by order in writing, place the child under care and control until he reaches eighteen years or for any period expiring before that date. Such an application, in the case of a legitimate child, shall be approved if made by both parents or by the mother in the case of an illegitimate child. Only if the whereabouts of the persons whose consent is required are unknown may the Minister make the order without the necessary consents. Again, no order in respect of a child who has reached the age of fifteen years shall be made unless he also consents. This section is the corollary of the power of the panel to suggest that a child is in need of care and control and to obtain a written undertaking from the parents that the necessary application will be made. The period for which the child is to remain in the care of the Minister is for the Minister to determine when he makes the order. Presumably he would act upon the basis of a recommendation from an officer of the Department in fixing the period. Even though, the important point is that it is fixed administratively and there is

no obligation on the Minister to hear representations from the child. It will be no answer to say that the parents have agreed to make a voluntary application and that the Minister will accept it in the same spirit in the interests of the child only. Should the parents refuse to give the necessary undertaking, the matter will, as a matter of course, be referred to the Court which is empowered to order that the child be placed in the care of the Minister. Any suggestions of the panel are therefore backed by legal sanction. As a matter of strict principle, undertakings by parents are never voluntary but are simply a recognition of the inevitable. That is not to say, though, that parents never request that a troublesome child be taken into care. In fact they do. Such applications though are rare and only in extreme cases. By far the majority of children in care are there because of Court orders and not applications by their parents. It seems that the aim of the Act is to change that situation so that it can be said that the majority of children in care are there because of free and voluntary applications by their parents. The problem need only be stated in these terms for the unreality of the intention of the Act to be manifest. As a matter of reality, the majority of the parents of children in care do not freely apply for them to be so admitted. It is submitted, that the situation will not be altered by the panel extracting an undertaking from parents backed by a threat of referral to the Court if it is refused. In other branches of the law such conduct would be regarded as duress.

Section 40 gives the Minister power to admit a child to care for a period not in excess of three months. The application may be made by the panel or guardian, or if the child is over fifteen, he may make it himself. Where the child has reached the age of fifteen years, he may not, in any event, be taken into temporary care unless he also consents to an application



being made by his parent or guardian. The section is of limited application because by virtue of s. 40(5) the child may not be admitted to a home established under the Act for a period of longer than three weeks without the consent of the person who made the application. If the parent or the child will not agree to a longer period in a home, then it would seem that the Minister would simply have to discharge the child after three weeks. This follows from the definition of "home" in the Act. The only alternative would perhaps be to send the child to an assessment centre which, it is submitted, is not a "home" within the meaning of the Act. An assessment centre is for assessment, whereas a home is for the reception, care, maintenance and support of persons in need or distress or in need of training. A child in care under this section may be discharged before the expiration of three months upon the application of his parent or guardian or of the child, where he is over the age of fifteen. Also, the Director-General may direct that the child be discharged. Discharge will also follow automatically when the period of the care has expired.

This section may be used for the assistance of parents who are temporarily unable to care for their children, for example where an only parent is hospitalized. It may also be used where the panel has extracted an undertaking from the parent that a short period in the care of the Minister may be helpful. There, the parent would make an application in the same way as under s. 39. Again, the Minister may, at his discretion, accept the application. This procedure may be of considerable use in cases where the family background is inadequate and the children neglected. A short period of care for some of the children of such a family would enable the parents to re-establish themselves without the full cares of family responsibilities. If sufficient improvement has been achieved, the children could be returned home at the end of the three months period.

There is another category of case where the Minister may make an order admitting a child to care and control. This is where a child who is in

custody in another State enters South Australia. There the Minister may make the child subject to care and control whilst he is in South Australia. That power is incidental only to the main objects of the Act.<sup>30</sup>

It is under these heads that children may be admitted to the care and control of the Minister. How the child is to be dealt with after such admission is provided in the Act. Again, the Act has laid down the principles which govern the exercise of the powers of care and control. Section 42 provides that :-

"In exercising the powers conferred by this division (i.e. the Family Care Services Division) the Minister and the Director-General shall treat the interests of the child... as the paramount consideration and shall adopt a course calculated to -

- (a) secure for the child such care, guidance and (where necessary) correction, as will conduce to the welfare of the child and the public interest, and
- (b) conserve or promote as far as may be possible a satisfactory relationship between the child and the other members or persons within his family or domestic environment."

This section ensures that the powers of the Minister or the Director-General are used for the purposes of social rehabilitation rather than for punishment. The objective, which all programmes initiated by the Minister or the Department have, is the future well-being of the child. Thus presumably, a scheme which was not conducive to the welfare of the child would be open to challenge. At all events, the welfare of the child must be the objective, unless the requirement of public interest is capable of some meaning which

differs from that of the welfare of the child. So that there is no doubt as to the guardianship of a child under care and control, s. 43 provides that the Minister shall be entitled to custody and guardianship of the child to the exclusion of all other people.

There are a number of ways in which a child in care may be dealt with. Although the Minister has legal guardianship and control, the details of the programme are the responsibility of the Director-General, who actually puts the programme into operation. In this function he has a wide range of options. He may -

- (i) allow the child to remain in the custody of a parent, near relative or a guardian, or he may return the child to the care of such a person;
- (ii) place the child in a care of foster-parents;
- (iii) place the child in any home established or licenced under the Act;
- (iv) if necessary for the sake of the physical or mental health of the child, he may place him in any hospital, receiving house or mental hospital;
- (v) finally he may deal with the child as the circumstances of the case may require.<sup>31</sup>

Where a child is placed apart from his parents, the parents must be advised of his whereabouts in writing.<sup>32</sup> It would seem to follow that if a child be placed in a way other than with his parents, then he could be removed there by the Director-General. However, to remove all doubt, this power is expressly conferred upon the Director-General by s. 44 (3). It may be that the intention of the legislature is that all the functions under the

Act will be performed voluntarily. The programme cannot, however, be frustrated for, if the Director-General directs that a child under care be placed in a home and he refuses to submit to the instruction, he may be apprehended by the police without a warrant and placed in the home specified.<sup>33</sup> Having been placed in the home, the child is then detained in accordance with directions given by the Director-General, subject, however, to the proviso that he shall not be detained beyond the period for which he is in care.<sup>34</sup>

An interesting innovation in the Act is the establishment of Review Boards. These Boards are set up within the Department and have the responsibility of considering and reviewing the progress and personal circumstances of children under the care and control of the Minister. When a child has been in care for more than a year, a Review Board obtains reports on his progress and personal circumstances and further reports at the end of each subsequent year are also obtained. Reports for the Board shall also be available to the Minister and the Director-General.<sup>35</sup> It appears that the Boards have no role other than to obtain reports. They do not report or make recommendations either to the Minister or the Director-General. What effect the reports are intended to have does not appear from the statute. Perhaps by the mere fact that they are required to obtain reports every year it is hoped that those in the Department who are concerned with decision-making will not forget children until they are forced to their attention. Greater protection to such children would be afforded if the Boards were given a specific responsibility to report, thus minimising the possibility that children will be simply lost in an unwieldy welfare bureaucracy.

Ordinarily, the upper age limit for children in the care of the Minister would be eighteen years. There is, however, provision for the period to be extended to the age of twenty years. The Director-General may apply to a

Juvenile Court constituted by a judge or Special Magistrate for an order that the period be extended. Both the child and the parents shall be notified of the intention to make the application. It is only the Court which has the power to extend the term of the care and control.<sup>36</sup> The power given the Court under this section may well prove useful where a child is backward and needs special care and sheltered employment. By an extension of guardianship the Department should be able to assist in any necessary referral to the mental health authorities.

Whilst the Kilbrandon Committee considered that the juvenile court system should be restructured to place proper emphasis on the sentencing aspect of the procedure, it was equally adamant, where questions of personal liberty were involved, that traditional judicial determination was the only method that would command public support. It followed, therefore that where a child was in care following the recommendation of a panel, there should be a right of access to the Court for review of the custody of the child. That recommendation was adopted by the Community Welfare Act 1972. In another respect the Act also follows the Committee recommendations, in that any placement under the care and control of the Minister is of indeterminate duration. Discharge would depend upon the response of the child to the programme to which he was subjected by the Department. Several methods of discharge from the control of the Minister are provided by the Act. Section 49 provides that a child may be discharged by the Minister upon a report from the Director-General. Such a report, presumably, would be made if the latter was of the opinion that the child's response had been satisfactory. If the purpose of the programme was achieved and no further training necessary, then the Director-General could report that the child should be discharged. In cases where the child came into care because of neglect, if the ability of the parents to provide the proper care has been restored the Director-General

may similarly recommend that the child be discharged. The essential point about this method of discharge is that it is discretionary and depends upon a report from the head of the department which is responsible for the child's training programme.<sup>37</sup> An alternative method of discharge is that a parent of the child may apply to the Minister for the discharge. The Minister may discharge the child upon such an application.<sup>38</sup> What criteria would be used by the Minister in determining the application do not appear from the Act. In some cases it could be of importance, for there cases may well arise where there is a difference of opinion between the parents and the Department. In such a situation the Minister would have to reach a decision as to how he would exercise his discretion. Should he infer that because the Director-General has not made a report recommending discharge that the child has not reached the stage where discharge is desirable? In such a case he may request a report from the Department. If the report be in conflict with the application he would be required to make a decision between them. One may speculate that where differences arise between the parents and the Department, the assessment of the Department would usually be the one considered to be most expert and therefore more objective and realistic. This conclusion would follow from the fact that the parents are emotionally involved and in any event, would often have a desire for children to be at home rather than in care. Parents may, hence, tend either to feel that the child has been sufficiently punished or that he has made such progress that further institutionalization is not necessary. In either case, it is probable that the judgment of the parents will not be as objective as that of an impartial third party. If the rights conferred upon the parents stopped there they would be hollow and ineffective, but they extend further. Where a request by a parent that a child be returned home is refused by the Minister, a right of appeal to the juvenile court exists.<sup>39</sup> An application to the Court may not be made until the child has

been under the care and control of the Minister for at least one year, it may be repeated in each subsequent year provided that no more than one appeal each year is lodged.<sup>40</sup> As with all other proceedings under the Act, the Court shall consider what course of action is in the best interests of the child. The Court is not bound by the rules of evidence but is obliged to consider all matters which it regards as relevant. The appeal shall be determined in the best interests of the child<sup>41</sup> and thus a jurisdiction is conferred upon the Court to review the whole of the child's situation. The Court may request reports from the Director-General so that it may be fully informed as to any Departmental programmes and the response of the child to the training provided. As the determination is judicial, the Court must also consider the submissions made on behalf of the parents. If the Court allows the appeal, then the child will be discharged from the Minister's care and control.

Section 49 (3) confers a valuable right upon children in care and their parents. It is inevitable that in a government Department, procedures will become stereotyped and standardised to some degree and, as this process occurs, the needs of individual children may not be fully met. Hence, an appeal to the Court in such cases may serve to bring to attention individual needs that have not been met.

For any system of juvenile justice based upon the principle of welfare and rehabilitation to operate successfully, it is essential that adequate background social information be available. So that this information will be available, the Act has authorised the Minister to establish homes, assessment and youth project centres. The assessment centres are established for the evaluation of children's personal circumstances and social background and the assessment of the most appropriate course of treatment. As a means of treatment, the Minister may establish youth project centres. These are centres where, without going into residence, children may receive training

and treatment. In addition, the Minister may also establish homes for the care, correction, detention, training and treatment of children on a residential basis.<sup>42</sup> Such homes shall be under the control of the Minister but are to be managed by the Director-General.<sup>43</sup>

Although the Act is couched in euphemistic terms, sanctions are not lacking. An absconder under the care and control of the Minister may be apprehended without warrant and placed in a home nominated by the Director-General<sup>44</sup> and, if he is above the age of eighteen years, he is liable to six months imprisonment.<sup>45</sup> Harboursing a child under care and control is also an offence<sup>46</sup> and, not only is harbouring an offence, but it is also an offence for any person to communicate with a child in a home, without the authority of the Director-General.<sup>47</sup> Children who are beyond the control of any of the homes under the Minister's control may, upon application to the juvenile court, be held in prison, if the court so orders. This power applies only to children who are above the age of sixteen.<sup>48</sup> To complete the care and control, the Director-General may require the employer of any child under care and control to pay the whole or portion of any wages due to the child to him to be expended for the child's benefit.<sup>49</sup>

Both the Juvenile Courts Act and the Community Welfare Act are intended to be complementary. Panels are created by the former but they have no executive power, the only role conferred upon the panels, and indeed the court also, being to prescribe the type of treatment to which the child should be subjected. These fall into three categories, namely, simple discharge, entry into a recognizance, with any attendant conditions, and placement under the care and control of the Minister. Broadly, these are the powers of the Court, the panel operates upon the basis of so-called undertakings by the parents and child. A panel may simply discharge a referral, or it may require an undertaking either that the child will place himself under supervision of



the Director-General, or under the care and control of the Minister. In either case, it is the Director-General who is responsible for the administration of the programme and it is he who assesses effectiveness and the child's response.

The legislation follows the general principle of the recommendations of the Kilbrandon Committee, but in one respect it does not. It was recommended by the Committee that treatment should be under the control of the panel and that the executive agency responsible for the administration of the programme should always be answerable to the panel. Reports should be submitted to the panel and all decisions would be made by the panel in the light of those reports. In particular, children in care would be in the custody of the panel, not of the Director, the executive authority or the Minister. The only role of the executive body would be the administration of the programme and the provision of reports to the panel. Here, then, there is a material departure by the South Australian legislation from the proposals of the Committee. The latter legislation puts the entire control of the programme effectively into the province of the Director-General. This could be of importance. The Department created for the purpose of the Act will, of necessity, be of some magnitude and is, in fact, the Department provides the bulk of the social services within the State. Of necessity, also, the Act can only operate through the medium of a hierarchy of recommendations, finally reaching the Director-General and the Minister. In actual practice, the officer having direct responsibility for the child's supervision or institutional care will submit a report to his superior, and so on, to the point where the decision is legally made. The persons who make the decisions, namely the Minister and the Director-General, will, in all cases, have to rely upon the information and recommendations in the reports prepared by other officers. That being so, in many cases, the actual decision will be

made by those lowest in the Department who will have the most direct contact with the child. This would be a de facto decision, translated into a legal decision by the properly authorised officers, the Director-General and the Minister. Such a procedure is inevitable, for it is quite out of the question that the Director-General would have sufficient first-hand experience with every child under supervision or in care to prepare reports and recommendations without reliance upon other officers of the Department. It also follows that the best first-hand reports upon any child can be obtained only from those in direct contact with him. Therefore, it is upon information obtained in this way that the ultimate decisions affecting the child must be made.

Even if the officers in direct contact with the child provide the best factual information, it is by no means certain that they are free from subtle personal influences that may affect their assessment of any particular case. There could be a conflict of personality between the officer and the child or the child could be a source of irritation. He could have habits that annoy his supervising officer and some children exploit particular characteristics of officers. What may in fact be only a childish attempt to annoy an officer may easily be interpreted as a lack of response to the programme, which would require more drastic action. It is not suggested that officers would deliberately present inaccurate reports because of overt dislike for their charges but these subtle influences, to which everyone is subject, may unconsciously have a bearing that is not recognised. Thus, it is submitted that legislation should guard against the possibility of subtle bias. In addition, there may be the possibility of bias where there is overt antagonism between a child and his officer and, hence, the legislation should provide guards against the preparation of reports that are motivated by dislike, rare though this may be in a professionally orientated service. But where the future and liberty of a child is concerned, these possibilities should not be left to chance in legislation as extensive as that under consideration.

Problems of this nature are most easily overcome by the method suggested by the Committee. Therefore where the panel has the final responsibility for decisions, the possibility of bias is reduced to a minimum. Not only does the panel have the benefit of reports by the Department, and any expert opinion that may be contained therein, but it may also gather any other information it requires. Reports on specific features of the child may be obtained. Most important of all, the panel may interview the child and his parents. There is, at least in this situation, the legislative provision for the airing of any grievances between the parties. The panel also has the necessary information and means of assessing the reports of the officials rather than merely accepting them as true in default of any information to the contrary. On the other hand, the system created by the South Australian legislation is that the whole programme is under the control of the Director-General and that is so even where the child is dealt with by the Court. For the Court is only empowered to place training programmes under the administration of the Director-General. If the child is placed by the Court under the care and control of the Minister, he will be released from care when the Minister gives the appropriate direction. Thus, under the system, the child is subject generally to the control of the Department but there is, however, an important qualification to this principle. Where a child has been committed to care he may, as already described, appeal to the Juvenile Court for an order that he be released. Such an application may be made upon a refusal by the Minister of a request for his release made at least one year after he came into care. If the initial application is refused by the Court, then it may be renewed by the child's parents in the future. The only limitation being that applications shall not be made until at least a year after the refusal by the Court of the last preceding application.

At this stage, it would be premature to assess the effectiveness of this

right of appeal. For full use to be made of it, the persons affected by the Minister's decision would need to be aware of their right to appeal which may be an important factor limiting the use to which it is put. Many people who come within the purview of the child welfare legislation tend to be of lower intelligence and, hence, their comprehension of such legal rights they have will usually be limited. It is, therefore, quite likely they will be unaware that there is a right of appeal against the Minister's decision. Another limiting factor is the attitude of the persons who feel themselves to be aggrieved. They may feel that a reasonable request has been unfairly refused and that, no matter what steps they take, their case will not be favourably considered. In other words, they may lack, through lack of understanding, the confidence that the Court will fairly hear and determine any application made by them. It is true that in the lower socio-economic groups, the values and objectives of the community are not identical with those of the individual members of such groups. There is, too, a third factor which could operate to limit the value of the right of appeal. Before the Court is in a position to make any decision at all, it needs to be provided with proper material. It is true that the rules of evidence do not apply to these proceedings but the Court must still have adequate information on which to assess the best interests of the child and to say that the decision of the Minister was incorrect. Here, the appellants could face difficulty. It would be most unlikely that they could place any material before the Court, other than to say that they could now provide proper care and control. Legal representation would be necessary if the application were to be properly presented and this may be difficult unless legal aid is made available. But even where the applicants are legally represented, the Director-General would be in a much stronger position than the appellants in the provision of material for the Court. Although, more optimistically for the applicants, it may be that some of the

material presented by the Director-General would assist their case. For example, if the child had shown a consistently favourable response revealed in the reports placed before the Court, then the case for the appellants might well be assisted. The Court would then have to consider whether the child's best interests would be served by discharging him from care and control. If the reports showed such a favourable response, but the Minister had declined to discharge the child, it would then become a matter for expert judgment whether the child's best interests would be served best by discharge or otherwise. Unless the appellants could adduce some expert opinion in support of their application, it is difficult to see how the Minister's decision could be disturbed.

Nevertheless, the right of appeal to the Court is an important one for it should have the effect of saving individual children from being lost in the system. When serious grievances do arise between the parents and the department, there is a legal tribunal in which they may be fairly and objectively heard and provided that it is, in fact, used by parents it should make a valuable contribution to the functioning of the legislation. Needless to say, in the exercise of so specialised a jurisdiction an appropriately qualified Bench would be essential. For if it were not to simply be in the hands of those who present the material the Bench would need to be able to assess social background factors and reports.

There is another aspect of the Act upon which some comment may be made. The whole theme of the legislation is that any programme for the training of a child should be the result of voluntary co-operation between the parents and the various agencies created for the purpose. That is not to say, however, that the voluntary element in the scheme can be taken to its logical conclusion, to enable the programme to be rejected, if it is felt by the parents that intervention is unnecessary. In legislative fact, the measures provided are

just as compulsory as the prohibition against murder. In the first place, the panel proposes a programme for the child. Then the parents and child are required to give an undertaking in writing that the programme will be followed. An undertaking in writing usually has legal consequences, which may be enforced by legal action if necessary. So it is with an undertaking given pursuant to a "suggestion" by the panel. An undertaking to the effect that the child will be placed under the supervision of the Director-General, or that he will be placed in the care and control of the Minister, may be requested by the panel. The first measure is not particularly strict but it is more difficult to believe that all the children in care are there as the result of voluntary applications by parents. It is reasonable to believe that such applications are quite rare. Should an undertaking be refused, then the matter is simply referred to the Court which makes a legally enforceable order and the case is referred to the panel. Thus, if the parents decline to make a voluntary application for the child to be removed from their care, the Court will do so. The same procedure follows the failure of a parent to give an undertaking that the child will place himself under the supervision of the Director-General. There, the Court will simply order that he enter into a recognizance which contains suitable conditions. For breaches of an undertaking, the case may be referred to the Court for appropriate legal action. If an undertaking is not put into effect by the child or his parents, the matter may be referred to the Court for the exercise of compulsive powers.

With the requests and suggestions of the panel backed by legal sanctions such as these, it is erroneous to describe the procedures as voluntary. It is little removed, except perhaps semantically from the Austinian concept of law as rules enforced by sanctions. Proceedings under the legislation, whether by the panel or by the executive agency, are just as compulsory as those in any other legal process. For the proper and most effective social work administration of the scheme, it is, no doubt, of importance that the officers

concerned should use the methods of social welfare rather than those derived from purely punitive considerations but this latter should not blind us to the extensive legal power at the disposal of the executive arm of the child welfare services and under the South Australian legislation, of panels. The statutes confer power to probe and direct every aspect of the life of a child who becomes subject to its jurisdiction. Certainly, the power must be exercised in the child's best interests; but what that best interest is, in social terms, must be defined. There is no simple definition in abstract terms and so it becomes a matter for the agency to decide. Obviously factors will vary, there being no universal standard. What will be in the best interest of a child from one background may not be so for one in different circumstances. Seen in this light, the discretion and power at the disposal of child social workers in statutory agencies is extensive but is, of necessity, subjective and discretionary. It is to this type of power that the South Australian-type legislation will subject many members of the community. It is the submission of the writer that adequate legal safeguards should be provided to check the misuse of such power. It seems to be of some importance, too, that the legislation should not be couched in terms that are misleading. If measures are compulsory, then the Act should say so in overt terms, rather than merely implying that such is the case.

#### Juvenile Panels in other parts of the World.

The general concept of a juvenile panel is not new and does, indeed, precede the Kilbrandon Report. It was the Norwegian Child Welfare Council, established by legislation in 1896, which initiated the idea of a panel for the disposition of juvenile offenders. There was power in the Council to commit children to care and for referral to a local guardianship board if the necessary parental consent was refused. Full powers of inquisition were conferred upon the Council and it could call upon the police for assistance in

its enquiries. The only right that was conceded to parents was an obligation upon the Council to consider their objections if they made them in writing. The legislation did require, however, that a member of the panel must be a legally qualified judge. This model was followed soon after by Sweden.

The Swedish legislation created a number of child welfare boards. These are local agencies, elected by the communes (the Swedish equivalent of municipal councils in Australia). The jurisdiction of the boards has been described as follows :-

- (1) children under 16 years, who because of their parents' immorality or carelessness are in danger of becoming delinquent.
- (2) children under 16 who are abused or exposed at home to serious neglect or other dangers to their physical or mental well-being.
- (3) juveniles under 18 who are found to be so delinquent that special training measures are needed for their reclamation.
- (4) persons (young adults) over 16 but under 21 who are found to be leading a disorderly, idle or vicious life or who have otherwise shown serious misconduct, and for whom special community measures are required for their reclamation.<sup>50</sup>

There is an over-lapping jurisdiction for the age group 15 to 21. Most of the offenders are removed from the Court system by an arrangement with the public prosecutor. Prosecution may be waived when appropriate arrangements have been made by a child welfare board. Second, offenders under 18 may not be sentenced to prison, except under special circumstances. Third, the criminal courts may refer an offender of less than 21 years for treatment by a panel.<sup>51</sup>



It is of importance to note that the Swedish child Welfare board is essentially local in character. Each commune has a board which follows the prevailing conditions in the commune with regard to the care and training of all children and young persons. The system of welfare boards is generally supervised by a central authority, the Social Welfare Administration, which is staffed by a body of experts in child care. However, the board itself, on the local level, also has expert assistance from a social worker who is known as the child welfare assistant. In composition, the board is fairly widely representative, and comprises :-

- (1) one member of the communes board of public assistance;
- (2) one clergyman;
- (3) one public school teacher;
- (4) at least two persons known for their interest in the welfare of children;
- (5) an official medical officer.

Members in categories (1) to (4) are elected by the communal government for 4 years, one must be a woman, and if possible one should be trained in law.

The board may call upon qualified persons to assist it with its work. This includes societies and foundations. It may appoint a particular board or society to administer an institution, or to supervise the placement of children in private boarding homes. Any institutional treatment of juveniles is administered by the School Bureau within the Social Welfare Administration.

There is no necessity, under the Swedish system, for the commission of an offence to be involved. If a child is referred to a board by, for example, a private person, because of delinquent behaviour, the board may still proceed, even if it finds that the allegation cannot be sustained. It is of no concern that the child may not have offended if his behaviour, in other respects, is such as to show that he is in need of treatment. For the board, the only criteria are those set out in the legislation. Whether or not a child has

committed an offence is irrelevant for the achievement of these goals. When the board receives a report, it is investigated and, it is from this point, that the task of the board commences. As a matter of practice, it seems to be the policy of the board to require a police report upon whether the child did in fact commit an offence. In the case of offenders in the 18 to 21 age group, the board may accept a referral if the crime is of only secondary importance in his total anti-social situation. Police investigations will be relevant in this consideration.<sup>52</sup> Procedurally, the board is like any other board. Rules of procedure do not apply, but minutes are kept which contain reasons for the board's decision. The actual conduct that brought the child before the board is of secondary importance only and does not merit extended consideration. What is of major concern for the board is future social need and detailed rules of procedure become unnecessary in this light. It is not even necessary for the board to make a finding of fact as welfare is the only consideration.

There are, however, certain rules of procedure which were introduced by the Swedish Child Welfare and Youth Protection Act of 1961. They provide, in effect, that the board shall properly investigate a case and that the parents shall be given a right to be heard. In addition the child has a right of representation before the board. There also is a duty to incorporate everything that may serve as evidence into the minutes. The object of this legislation, which confers legal rights that did not exist under the previous Act, was to ensure that the boards operated upon a standard formula. It also had the effect that the legal rights of offenders were made more secure than had previously been the case.

Where the board decides that it has jurisdiction over a child, it has a wide choice in deciding what should be done. The most lenient course of action is that the board may admonish the parents. It may subject the child

to certain prescriptions or order that an agency give training and guidance to him in his home. In this the responsibilities of the board are similar to those of a child welfare officer in respect of a child under a supervision order. These measures may, however, fail, and where that is so, the board may take the child into care. He may be placed in a school institution or a private boarding home, or in any other placement that is appropriate. The crucial consideration is the care and guidance he needs to make him a useful member of society. What is required to make him a useful member of society is a matter which falls within the province of the board to decide. The whole process is an administrative one and, subject to the right of the parents to be heard, any decision made is an administrative one.

#### General Summary:

The aims of a juvenile panel and that of a court are the same but the difference lies in the method of approach. By legislation, the Children's Court must look to the future welfare of the child in arriving at a decision as must the panel. There is, however, a material distinction between the scope of the operation of the two. Whereas the Court has jurisdiction over all children who are charged with offences, the role of a panel is confined to those children who are in need of some form of future training. The scope of the Court's role is therefore much wider, for many of the children charged before the Court are simply discharged because no action is needed and they do not appear before the Court again. Children in this class do not necessarily come before a panel. If the referring officers are of the opinion that no further action in respect of that child is necessary, then he need not be referred. Under the South Australian legislation unnecessary referrals are possible, because the machinery for referral is the same as that for any other offender, through the agency of the police. Possibly, referrals

will be made as a matter of course, leaving all decisions to the panel. The proposals in the Kilbrandon Report render this type of situation impossible, because the referral must be made through an agency which must exercise some care and consideration in the matter. It is incumbent upon the reporter under the Kilbrandon proposals to consider whether some form of intervention is necessary before a referral to the panel is made. In that way it is possible to ensure that only those children needing help are subject to the referring experience, which is bound to be anything but pleasant.

Legislation creating juvenile panels or child welfare boards is extensive and in many areas replaces the authority of the parents. Such replacement is without a judicial determination, and ideally with the so-called consent of the parents, and if possible of the child also. A whole range of actions are available at the option of the panel, all of which intervene in the routine functioning of the family and involve the liberty of the child. These options range from a simple regulation of the child's life and home and his parents control over him to his complete removal, not only from home, but from the care and control of his parents. He then becomes subject to the control of an administrative agency, which in reality is answerable only to itself. Legally, children under the supervision of the Department of Community Welfare have the safeguard that the Minister is responsible to Parliament but this will not provide any actual check in the vast majority of individual cases. Answerability of the Minister to Parliament will of course serve to ensure that the administrative procedures of the Department as a whole do not become excessively bureaucratic to the point where the needs of children as a class do not count. But it is the individual child who must be considered. For this type of system to be successful, the treatment needs of each child must be isolated. It is submitted that this is the main justification for the panel procedure and without proper provision for the individualisation of

treatment, its existence is difficult, if not impossible, to justify. Even so, these administrative measures, no matter how conscientiously motivated, may still excite resentment in parents and clients generally. A small proportion of families may welcome measures that will remove their children from home but many others will resent it. The same may be said of any intervention by the panel. Inevitably, therefore, the question arises, whether such grave decisions ought be made administratively. The problem is whether an administrative officer, albeit a professionally qualified social worker, is as well equipped to make such decisions as a judicial body. The former is accustomed to a consideration only of his own private criteria. He need not hear the other parties nor weigh alternatives. His sole guide is the welfare of the child and here again, it is his own conception of what the child's welfare should be. There are no objective guide-lines as to what a child's best interests may be. A course of action which one officer may regard as satisfactory, another may not. How is the decision of one administrator to be distinguished from that of the other? Any distinction, if there is one, is purely in the mind of the two different officers. On the other hand, it is of the essence of the judicial technique that a decision is reached having regard to ascertainable criteria. There is an identifiable line of reasoning, the reasons for the decision are stated and is capable of scrutiny. It is possible to say of a proper judicial decision that it is right or wrong. Also of the essence of the judicial process is that all interested parties have the right to be heard. The competing interests are each expounded to the tribunal. A valuable right could well be lost through welfare legislation for once a child is in care, his future is in the control of the Minister, who may make further decisions but who is under no obligation to hear the child or any other interested persons, before doing so.

Under the South Australian legislation, the panel must interview the child and parents before any programme is suggested. There is, then to this extent, an in-built safeguard against excesses. There is a further safeguard in that any decision of the Minister refusing an application for the child's release from care may be challenged in the Juvenile Court. It remains to be seen just how effective this right will be, but it is a recognition that the decisions of the welfare authorities are important and the party affected should have a right of appeal to a judicial body. There is also a further concession to legal rights in the South Australian Act in that any referral to the panel must allege the commission of an offence, which the child must admit before the panel can proceed. These measures overcome the most serious of the jurisprudential objections to legislation of this nature. To what extent the threat of referral to the Court will have an inhibiting effect upon references is enigmatic. If referral is held out as a threat, then it is illogical to say that the panel puts into operation programmes devised in co-operation with the parties and, as already noted, the Act gives sanctions to the authorities where the necessary co-operation is not forthcoming from the offender's family.

There is also another problem; that is, in the relationship of the panel to the Courts where a serious crime of property loss is involved. Here, the problem is whether the welfare approach can represent and protect the interests of the community at large and maintain respect for the law at the same time. If the community regards a serious child offender as being "let off" will it continue to respect the law that created the welfare machinery? There is also another aspect of this problem, which raises the problem of the relationship of the welfare agencies and the police and prosecuting authorities. Police have a commitment to uphold the law and, to that end, to launch prosecutions where appropriate. It has been said of prosecuting

officers that they<sup>53</sup> tend to be mainly male and middle-class. They look to the nature of the criminal activity of the child, his past record, what he is likely to do in the future and whether it is probable that he will offend again. As a body, they accept the notion that each crime should have an appropriate penalty, to be paid by all offenders. Only in this way they consider is it possible to prevent crime and thereby, protect the public. This approach is the anti thesis of the welfare approach where notions of punishment and the protection of the public from crime do not form part of the welfare philosophy. In application, the welfare approach looks to the personal circumstances of the individual, what problems he has and in what way he may be assisted. By assisting the individual to become a well-adjusted member of the community, the welfare approach aids, it may be said, crime prevention. But it does so, however, in an essentially different way from the retributionist method of the prosecutor. Whether either method is effective is, it seems, open to debate.<sup>54</sup> Lemert quotes the experience of Sweden as an example of this conflict and the consequences it may have. Under Swedish law offenders between 18 and 21 can be prosecuted, but the prosecution may be waived if the public prosecutor is satisfied that the offender will submit to a course of treatment by the child welfare board. After 1958 the number of cases where prosecution was waived began to drop. This, according to Lemert, was a result of a deliberate policy change by the Head Prosecutor. It was publically announced that the Boards had been too lenient with offenders. Against this, was the background of a rising crime rate and the appearance of the narcotics offences for the first time as a serious problem.<sup>55</sup> This conflict, ultimately affecting the content of statutes, may easily result in the welfare approach being confined to the very young offenders. Those offenders, such as teenagers who, for example become drug peddlers, may finally be left to the ordinary methods of the criminal law, until better

solutions have been shown to be effective. If welfare methods are seen to fail, the call for heavier and retributive punishment will be renewed. Already pleas for heavier penalties are quite common, both in the courts and public debate. Such a possibility is particularly disturbing because of the lack of precise knowledge of just how successful social work is. There has, it seems, been little research to ascertain the measure of its success or to define what, in the correctional field, should be regarded as a success.<sup>56</sup> It seems to have been recognised that the methods of social work are of doubtful value and that the social workers have become alienated from their clients. Many reasons for this have been cited. Excessive reliance on therapy and a restricted conception of the role of the worker. Whether he is a "professional" in just the same way as a medical practitioner or a barrister, or whether he should have a more general responsibility to his client. Social workers tend to work in organised agencies and, as such, become subject to the policy and organisational restrictions of the agency and once that becomes the case, the individual needs of offenders cannot be met. If these doubts and uncertainties exist, there may be some merit in the argument that the liberties of the citizen should be in the hands of the Court, and not an administrative tribunal whose methods and procedures are yet far from verified. It is submitted that, as yet, social workers cannot justify the power placed at their disposal by such legislation as that creating juvenile aid panels. Where these bodies are created, then legal rights must be closely guarded.<sup>57</sup>



NOTES

1. Cmd. 2306; 1964
2. Supra para 52
3. " " 70
4. " " 73
5. " " 100
6. " " 111
7. " " 116
8. " " 138
9. " " 146
10. " " 156
11. " " 157
12. " " 158
13. " " 159
14. " " 160
15. " " 161
16. Juvenile Courts Act 1971 (S.A.) SS 17-24
17. Supra S. 29
18. " S. 41
19. " S. 42
20. " S. 44
21. " S. 42(3)
22. " S. 46
23. " S. 48
24. " S. 49
25. " S. 56(7)
26. " S. 58
27. " S. 58(2)
28. " S. 64(1) and (2)

29. Community Welfare Act 1972 (S.A.) S. 38
30. Supra S. 41
31. " S. 44
32. " S. 44(2)
33. " S. 45 (1)
34. " S. 46
35. " S. 47
36. " S. 48
37. " S. 49 (1)
38. " S. 49 (2)
39. " S. 49 (3)
40. " S. 49 (4)
41. " S. 49 (5)
42. " S. 58
43. " S. 59
44. " S. 76 (1)
45. " S. 76 (2)
46. " S. 77
47. " S. 78
48. " S. 82
49. " S. 81
50. Nyquist: 'Juvenile Justice', London, Macmillan & Co.  
Pty. Ltd. (1960) p. 5
51. Supra p. 6
52. " p. 49
53. Lemert: 'Instead of Court', National Institute of  
Mental Health (1971) p. 41

54. Supra p. 1-18, 50
55. Supra p. 41
56. Alvin Gouldner: 'The Secrets of Organisations'  
National Conference of Social Work (1963) p. 161-177.  
Edwin Powers & Helen Witmer: 'An Experiment in the  
Prevention of Delinquency': New York, Columbia University  
Press, (1951) p. 577
57. In the United Kingdom the Children and Young Persons Act  
1969 has substantially re-shaped the juvenile justice  
system. This followed a White Paper in 1968, Children  
in Trouble Cmd. 3610. After consideration the Paper  
considered that the Court system should be up-dated, but  
it should nevertheless remain as a Court of law, with  
rights of appeal to Quarter Sessions. This paper was  
subsequent to the report of the Kilbrandon Committee.  
There is an interesting discussion of this Act in J.E.  
Hall Williams: The English Penal System in Transition  
1970, Ch. 26.

CHAPTER 6FAMILY COURTS AND JUVENILE JUSTICE

Because juvenile delinquency has been seen as related to family dynamics, that is, as a symptom of some problem within the family unit, it follows that for the full recovery of the child offender, the family must also play a role. The question then, is whether cases of juvenile delinquency be handled not by the ordinary courts of justice, but by a court, which is set up and especially equipped for dealing with the complexities of family life. If it is true that the decay of the family is a cause of delinquency, then should not the family unit be treated as such? Whether or not the decline of family life has contributed to the increase in delinquency, there has been pressure, mostly in the United States, for the creation of courts for the handling of family problems which have a legal flavour, namely: divorce, maintenance and the relationship between parent and child. These courts are known as family courts, and handle all problems which affect the family as such. Thus divorce, maintenance, custody disputes all, at present, heard by different courts, would be dealt with by a specialized court. Proper social work support is provided together with staff who have adequate skill and training in social work methods. An appreciation of the social background to what appear to be legal problems would aid the judge in understanding the social motivation behind what prima facie is simply an unlawful act. Diverse jurisdictions are confusing for the litigants and add to expense. But more important is the fact that no court develops expertise in the social and psychological factors that manifest themselves in family disputes and cases that result from a breakdown in family relationships. It also follows that the elaborate treatment and rehabilitation programmes mapped out by welfare agencies for juvenile offenders pass out of the control of the court to that of the public service. Although the Court has ordered the programme, it has no control over subsequent

developments. Under present circumstances it may well be argued that the Court does not have sufficient expertise to participate in the administration of a programme.

Fundamentally, the proponents of family courts envisage a unified jurisdiction over all family problems. Staffed by trained personnel, the Court could investigate the causes of particular disputes, or why a child committed an offence. With the help of this expert information, the judge would then come to a decision. Treatment could also be administered at a clinic controlled by the Court. It would, however seem that long term custodial treatment or the placement of children other than in their own home would still need to be undertaken by the social service authorities. Psychological counselling and supervision could, however, be undertaken by a clinic attached to the Court for the purpose. It follows, of course, that all necessary information about the child or family must be readily available to the Court. Of importance, too, is the fact that the treatment is carried out under the control of the Court and is the responsibility of an officer of the Court. So long as there is adequate communication between the judicial, administrative and rehabilitative sections of the Court, the rights and person of those under treatment should not be imperilled. These lines of communication should, however, be carefully maintained as psychological treatment would be no less burdensome simply because it is administered by a Court controlled agency. If the judicial approach is lost, then the proposal loses a good deal of its merit. The underlying philosophy is basically the same as that for the Children's Court: whereas the latter looks to the best interest of the child, the Family Court looks to the best interest of the family. The approach is therapeutic. If it is because of a deteriorating relationship between the parents that the child has absconded or is neglected, it is possible for the Family Court to provide the necessary assistance to the parents. Ordinary Children's Courts are limited to the child. Attempts

may be made to deal with family problems, but if the overtures are rejected, then the Court may deal only with the defendant. The success of the attempts, under the existing system, to modify family pressures contributing to misbehaviour of children depends upon the skill of the supervising officer as the court has no power to order, for example, that the parents attend a marriage guidance counsellor. There must then be at least three fundamental characteristics in a tribunal for it to be a family court: first, there must be an integrated jurisdiction over family problems. Second, the Court must have officers who can investigate and report back to the judge or magistrate. Third, it must have professionally trained counsellors who can carry out the treatment programmes. It goes without saying, that the judge or magistrate in such a court must have proper qualifications to sit in a jurisdiction so specialized, so that the bench is not hopelessly in the hands of the non-judicial experts who carry out the reporting and then execute the order, no matter how good their intentions.

The National Council on Crime and Delinquency, a voluntary association of probation and parole officers in the United States of America, has put forward a set of standards for family courts, known as the Standard Family Court Act. It is proposed by these standards that the family court should exercise an integrated jurisdiction over delinquency, neglect, behavioural problems and an injurious environment, ungovernability, custody and guardianship, adoption, termination of parental rights and commitment of the mentally ill or defective. Where communities have an extensive system of courts, such a proposal may easily give rise to jurisdictional doubts as between the courts. The Standard Family Court Act does not confer on the family court jurisdiction in divorce, yet it does have jurisdiction over custody and guardianship. For example the question may arise as to which court has jurisdiction where one court grants a divorce and custody of the children to one of the parents, and a dispute subsequently arises as to that custody. Does the Supreme Court, having jurisdiction in divorce, maintain as an incident of that, jurisdiction

to vary custody orders, or does the family court have exclusive jurisdiction, once the Decree of dissolution has been pronounced? It is a question of policy, but may give rise to difficulties.

In the Tasmanian setting, the question of jurisdiction should not prove an unsurmountable problem. Jurisdiction over family problems is of course shared between the Supreme Court, in its Matrimonial Causes Jurisdiction, and the Court of Petty Sessions, both in its jurisdiction under the Maintenance Act and under the Child Welfare Act. There is also another power, under the Justices Act for the Court of Petty Sessions to bind over a person to keep the peace towards the complainant. That is sometimes used by estranged wives to subdue belligerent husbands. Essentially, though, the whole of the family jurisdiction is shared between two courts only. The Court of Petty Sessions, in its varying jurisdiction, is constituted of the same staff and bench but merely exercises jurisdiction under different statutes. The only significant jurisdiction exercised by the Supreme Court in regard to family problems is its jurisdiction under the Matrimonial Causes Act, for the bulk of family cases come before the lower court, mostly under the Maintenance Act and the Child Welfare Act. That being so, it would be simply a matter of creating the proper reporting and treatment facilities under the control of the Court to introduce the essential notion of the family court concept. There is already provision under the Matrimonial Causes Act for the registration of maintenance orders made in divorce cases in the Court of Petty Sessions so that they may be enforced summarily. The point simply is that in the creation of a family court in Tasmania difficult problems of the inter-relationship of a wide range of courts would not occur. It would seem to follow from this premise, that the status of a family court would be equivalent to that of the present Court of Petty Sessions.

In the United States, it seems, fortunes of Family Courts have been mixed, to say the least. Foremost of the problems was the relationship of the family court with the other courts. By and large, they were of a much lower status than the Superior Courts, and their jurisdiction was confined accordingly. They had jurisdiction over such matters as neglect and delinquency and enforcement of small maintenance orders, but did not have jurisdiction over divorce and adoption. People appearing before the family courts were almost exclusively lower class. The courts were poorly housed and the staff formal and rude. There was a loss of morale in the judges, who were regarded as inferior. These problems could be overcome, it was argued, by giving courts higher status, or made divisions of the Superior Courts<sup>1</sup>.

In Tasmania, where the bulk of the jurisdiction over children and family problems is exercised by the one court, the Court of Petty Sessions, these difficulties should not arise. It is simply a matter of providing an adequate and reliable reporting and counselling service for the court as regards those matters which at present come within its competence. In the event that the divorce jurisdiction were conferred upon a different court, or if a Federal Family Court were created in Australia, the position still should not be jeopardised. The divorce jurisdiction would still be limited to matters arising from divorce, leaving untouched the family problems that do not involve divorce. It may well be more desirable to confer federal jurisdiction on divorce upon an especially created system of family courts so that the whole range of family problems may be settled in the one court. The court would, of course, need to be of sufficient status to avoid the problems that arose in America and it may well be that it would have to operate on two levels. One level of the Bench to be equivalent to Magistrates, who would sit on delinquency matters and another Bench, of the status of Supreme Court judges, would then exercise the divorce jurisdiction and sit on appeal from the Magistrates.



Family courts must, of course, have proper supporting staff. Without expert staff, in adequate numbers, they cannot provide the service that is connoted by the concept. These experts must be under the control of the court itself. If they have other responsibilities other than to the court, they may come to have divided loyalties. The duty to the Court may demand one course of action, but if the officers are seconded to the Court from the welfare services, the attitude of the latter may influence their attitudes and judgment. It is the Court that is in control of the programme and so it must also be in control of the staff who administer it. There may easily, in such cases where the officers have dual responsibilities, be conflict between the various agencies as to how the officers are to be employed. From this situation may grow an antagonism between the Court and the other corrective agencies. Since co-operation in this area is essential, staff and inter-organisation rivalries and disputes should not be allowed to arise in the first place. In the United States, it was found almost impossible to resolve such problems where the officers were not actually, as opposed to ostensibly, under the control of the judges of the family court.<sup>2</sup> On the other hand it may be argued that if a professional officer is not entirely dependent upon the Court then he may be more frank and unbiased and may, if necessary, disagree with the Court personnel.

#### The Pre-hearing Procedure

As with most welfare legislation, there is opportunity for abuse in the services provided by a family court. Overall, the policy is to provide social assistance. It follows that, if a Court Social Worker can solve the problem without a formal hearing, then he may prefer to do so. This is the type of procedure that may be termed voluntary, but in fact it is not. Should the so-called "assistance" be declined, then the officer will simply file a

complaint in the Court. To avoid that the family may acquiesce, and so the problem is dealt with informally. Many drastic steps may be taken in respect of a child subject to 'voluntary' supervision, without a legal adjudication by the Court. Unless that tendency is kept under control, the child would be effectively denied whatever legal rights he may have. The same may be said of the family, in so far as it is subject to the influence of the threat of legal action, unless the desired co-operation be extended. This danger may be effectively limited by providing the areas that are to be investigated in the relevant statute.

There are two stages in the hearing. The first is the fact-finding process and, second, the questions as to the decision. Only in the latter are the social investigation reports admissible before the judge. In that respect, the family court concept resembles the present procedure for the disposition of cases before the Children's Court. It is only after there has been a finding of guilt that the social background reports become relevant. In the same way, the existence of problem that has brought the family to the notice of the Court must still be established before the Court may exercise its jurisdiction. If it is alleged that a child has offended, then the commission of the offence must be proved. It may be sought to invoke the jurisdiction of the Court because of the failure of the father to maintain the wife and children, again his liability to pay maintenance must be affirmatively established before the Court may intervene.

Broadly, the function of the pre-hearing procedure is to determine whether the intervention of the Court is necessary or whether the problem may be better dealt with in some other way, perhaps by another agency. However, quite a few cases are screened out before the stage of a final hearing before the Court.<sup>3</sup> So long as there are adequate safeguards it is submitted that such a procedure has much to commend it.

### General

In the parts of the United States where family courts were given jurisdiction in respect of delinquency it was found, it has been said, that the latter stigmatised the whole institution, so that the role of the court as to the other areas of jurisdiction became ineffective.<sup>4</sup> Once the court became known as the court that dealt with young criminals, people who had social, but non-criminal, problems were reluctant to take advantage of the court's resources. Adoption cases came to be sent to other courts, or where the family courts kept jurisdiction over them, they sat in a building especially set aside. The same problem arose in cases of custody disputes. In time, the role of the courts became almost exclusively concerned with delinquency and the enforcement of small maintenance orders and even then, almost exclusively in the lower socio-economic groups of the community. As a practical consequence, their jurisdiction became limited for a court which was concerned almost wholly with matters of petty delinquency and maintenance enforcement could not deal with complicated matters arising out of divorce proceedings, particularly if questions of property were involved.

There would seem to be no reason why the same problem should not be experienced in any other jurisdiction that chose to establish a system of family courts. No doubt pressure would arise for the separation of the areas of work that had no connection with delinquency from those which had. For those who are familiar with social problems, it may seem logical that there need be no distinction between delinquency and other forms of social malfunction but for the other members of the community the situation is not so clear. For them, they may have quite unjustified, but nonetheless real fears, that to adopt a child or obtain maintenance or a divorce it is necessary to go before a criminal court.

Under the existing legislation in Tasmania, the Court of Petty Sessions has fairly extensive jurisdiction in matters which involve social problems.

In addition to the adult criminal jurisdiction, it also has jurisdiction under the Maintenance Act (19 ) pursuant to which it may make custody orders. The jurisdiction of the Children's Court has already been discussed. In each case, it is the same court which exercises the jurisdiction, yet there has been no suggestion that any stigma attaches to the obtaining of a maintenance order from the Court. On the other hand, though, it would seem that the Children's Court is regarded more as a criminal court than as a social welfare agency. The answer may, perhaps, lie in the fact that there is no unified jurisdiction. When the court sits as a Maintenance Court it is not exercising a criminal function and as such is accepted by the community. If the structure of the Court were changed and accompanying legislation was couched in terms of 'welfare' the same image might not subsist. The same problem may arise as in the United States and the court would come to be regarded as basically criminal, with some other ancillary duties. It is submitted, that it is essential that the court should be supported by adequate social work assistance. In that case, then it is submitted that all the goals of the family court notion could be attained within the existing court structure.

NOTES

1. See generally :- Paulsen: 'Juvenile Courts, Family Courts and the Poor Man' 54 Calif. L. Rev. 694 (1966).
2. Dyson: 'Family Courts in the United States' (1968) 8 Jo. F. Law. 543-545
3. Dyson: 'Family Courts in the United States' (1969) 9 Jo. F. Law 4, 7 - 8.
4. See generally Dyson above, Notes 3 and 4.

CHAPTER 7CONCLUSIONS1. Limitations of the Court.

The objectives of the philosophy motivating the Children's Court principle are indeed laudable, but whilst they may be relatively simple to express in words, translation into reality is a matter of something of more than transitory difficulty. For in this area most of the fundamental problems of urban living conditions, the nature and causes of juvenile delinquency and the whole range of social, psychological, economic and legal problems that go with sophisticated technological society come to bear on one institution. Any assessment of the juvenile Court jurisdiction immediately faces the problem of the lack of accurate and available information. In the United States, the Task Force on Juvenile Delinquency and Youth Crime conducted an exhaustive survey of American Juvenile Courts. Problems in the system, in the opinion of the Task Force, were deeper than the obviously inadequate accommodation and hackneyed cries about lack of staff, facilities and money. No matter how great the infusion of resources, the problems facing the Court and the community would still remain. It was not merely tangible material resources such as money and staff that were needed, for if these were supplied the problem sought to be solved would still remain. The missing link is fundamental knowledge: what is the cause of youth crime? What methods may be used to prevent it? As the task force noted in its report :-

"But it is of great importance to emphasise that a simple infusion of resources into juvenile courts and attendant institutions would by no means fulfil the expectations that accompanied the court's birth and development. There are problems that go much deeper. The failure of the juvenile court to fulfil its rehabilitative and preventative promise stems in important measure from a grossly over-optimistic view of what is known about the phenomenon of juvenile criminality and of what even a fully equipped juvenile court could do about it. Experts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programmes for the child. There is no shortage of theories of the etiology of delinquency. But fundamentally delinquency is behaviour, and until the science of

behaviour matures beyond its present confines, an understanding of these kinds of behaviour we call delinquency is not likely to be forth-coming. Study and research tend increasingly to support the view that delinquency is not so much an act of individual deviancy as a pattern of behaviour produced by a multitude of pervasive societal influences well beyond the reach of the actions of any judge, probation officer, correctional counsellor or psychiatrist."<sup>1</sup>

Nonetheless, this concept has been the justification for the extensive intervention in the lives of individuals by modern child welfare legislation. There is no doubt that the ordinary criminal law has long shown leniency towards youthful offenders but what has changed is the manner of expression of that leniency. Whereas in earlier times, a child might have been sent to a reformatory for a stipulated period because of some act of delinquency, nowadays he may be subjected to a child welfare programme, which may last until he reaches adulthood. For the future, the role of the Children's Court jurisdiction will be one that will involve many disciplines. The notion that the Court, acting on the reports of social workers, will make an order that will rehabilitate the child is no longer adequate, if it ever was at any time in the past..

To suggest that the attainment of the rehabilitative objective is attendant with characteristic problems is not to deny that rehabilitation is a legitimate goal. Nor is it to say that progress is impossible or to exchange new errors for old ones. But it is to say, that unless progress is based upon proper knowledge, new and distinctive problems will be raised. Change for the sake of change is of no value nor is so called progress which is not properly based on a sound footing. To ensure that real progress will result from reform, it should be soundly based upon scientific knowledge. Such knowledge is essential if the Children's Court is to retain the respect of the persons with whom it deals and the confidence of the community. Nothing will be achieved, for example, by sending one child to an institution by

declaring him a ward of the State and allowing another child who commits a similar offence to remain at home if no one comprehends the purpose of the order and if the child in fact obtains no benefit from institutional care. It is misdirected to suggest that the child was sent to an institution for his own benefit if none is apparent. Equally, to say he was sent there for punishment may be more comprehensible to the general community but it is no less erroneous for that. Even so, it is important not to over-react and become the slave of emancipation. Simply because we do not at present have sufficient knowledge to attain fully the rehabilitative goal does not mean that it should be abandoned.

Doubtless, the Court and the community may sometimes come into conflict or, on the other hand, it may be said that such conflict occurs because the community is not fully committed to rehabilitation as the ultimate goal of the Court. Basically, the attitude of the community supports justice in the classical retributionist sense. This conflict between Court and community is indeed, given limited expression in the Child Welfare Act.<sup>2</sup> The Children's Court is a Court of law and has responsibilities to the community flowing from that status. Is the interest of the child and that of the community always identical? Or, if they are not identical, are they exclusive? What has become known as the rehabilitative role of the Court may obscure the responsibility of the Court to the public at large.

Those who support an exclusively therapeutic role for the Court would logically answer that there is never any disparity between the respective interests of the child and the community. In all cases the best interest of the child will be that of the community. If the methods used by the Court can fundamentally change the motivation of the child so that he may in the future live in harmony with the community, then that not only advances the welfare of the child, but also is conducive to the best interest of the



community. No longer will the child be anti-social and defiant but a conforming member of the community. Thus, at one and the same time, the child is made a better person and society is ridded of a potential adult criminal and present child delinquent. Of course there is every reason why a community should provide proper therapy and care for its children and in the long term, it will lose if it does not. Still, however, the answer is not sufficient: it is a question of whether the Court if it is capable of attaining all the objectives set for it, still has wider goals than those which are personal to the child. What, too, of the cases where, because of lack of knowledge, the Court cannot achieve its goals? This latter category may be broadened to include the children whose conduct no Court is capable of influencing, arising, for example, from depressed economic conditions. Perhaps it is this last category that places the greatest emphasis on the rehabilitation theory.

Most urban communities are confronted with large numbers of youths whose behaviour cannot be ignored, because it seriously endangers security and is a menace to the population in general. But they are beyond the reformatory resources of the Court. It is difficult to say that they are mentally ill, but they have become detached from the established institutions of the community. They are the itinerant youth of the lower economic class. Employment is menial and uninspiring and they lack drive and ambition. Life for them holds nothing worthwhile. Perhaps their behaviour is simply an adaption to what is, in reality, their environment. It would seem that such conduct is, in part at least, due to factors which are beyond the control of the Court. The conditions that cause the intervention of the Court are the same ones that the child will return to after the completion of the programme. What, in the ultimate, has been achieved? Should the Court not be permitted to operate in such cases? It is submitted that, even with its limitations,

the Court still represents the best hope for children in these conditions.

To say, though, that the role of the Court is therapeutic or rehabilitative is, it is submitted, incorrect. Here, the role of the Court is a simple one: it is a response to behaviour which is inimical to the community interest and cannot therefore be ignored. The behaviour which has brought the child before the Court is contrary to the criminal law. In these conditions, the role of the Court is simply to deal with that conduct in the same way as any other Court with criminal jurisdiction. That may be the reality of the situation, but it is not to deny that rehabilitation is a legitimate goal and is not to be taken as suggesting that the Court lacks commitment to the rehabilitative role. It is merely a recognition that bad behaviour arising from poor environmental conditions is beyond the control of the Court and its executive agencies. What needs to be dealt with are the conditions giving rise to the behaviour, a task clearly outside the mandate of any Court of law. The submission, simply, is that these facts cannot be disregarded in any assessment of the Courts successes otherwise. Because of this fact, the Court must, from time to time, assert the standards of community. It does so in the ordinary application of the law for there is a responsibility upon the Court to protect the community from criminal behaviour. If the means by which it must discharge that responsibility are not satisfactory, either to protect the community or rehabilitate the child offender, that does not affect the essential role of the Court. Ideally, the role of the Court should be to secure the welfare of the child, but that should not render it impossible to appreciate what are in fact sound realities. Of course, the welfare role of the Court has provided an important impetus towards the development of methods and facilities whereby it may be translated into a practical reality and from that point of view its importance cannot be over-estimated. But at the present time, the theory is incomplete, and bad

results may follow from a slavish and uncompromising commitment to the welfare ideal. What is, in fact, reality must be recognised as such.

The first and most important of such consequences to be avoided is that laxness should not be allowed to intrude into any of the Courts adjudicatory or sentencing functions, and justified on the ground that the Court is exercising a helpful paternal role and should not be hampered by legalism. One must hasten to add that there is no suggestion that the Children's Court in Tasmania is in any way lax or that the rules of procedure are not at all times scrupulously observed. What is under consideration is the tendency which may result from an over-confidence in the welfare theory to the exclusion of the more formalistic legal procedure and the legal rights of an accused person on trial. If it is conceded that the sole function of the Court is to exercise a paternal jurisdiction, then it is an easy step to regard all other matters, including legal rights, as collateral and subservient to the new welfare role. Having regard to the practical limitations on the welfare role, it is contended that legal rights should not be over-ridden in favour of paternalism. It is possible for persons concerned with the Court to regard it as part of the social services. There is an important need to ensure that the professional social workers working for the Court be fully aware of the legal basis of the Court's jurisdiction.

An additional factor may be the wide definition of a neglected child under the statute. In neglect cases, the role of the Court is more clearly paternal than in any other case. Nonetheless, the legal principle upon which the jurisdiction is founded is that a certain state of fact exists (in neglect cases) or that an offence has been committed (in delinquency cases). To determine these factual matters is a judicial function and the Court has no role at all unless there is an affirmative judicial finding on the question of fact. Any contention that the Court may proceed simply because it is of

the opinion that it may be able to assist the child is unsound both in law and in the public conception of justice. What is emphasised is that the same result must not come in through the back door by a waiver or any subrogation of the importance of the preliminary jurisdictional principle, that is, the judicial finding on the question of fact. The judicial role of the Court must never be allowed to be obscured by the so-called over-riding welfare role and that will be just as much the case where the Court may be said to have a genuine rehabilitative role as where it does not. When it is realised that in many cases the Court is performing the duties of an ordinary criminal court, the argument assumes even greater cogency. In the light of this view it is submitted that it is incorrect to regard the Court only as a paternalistic welfare orientated body: the Court is such a body, but it is also part of the ordinary system of justice and has wider responsibilities.

From this contention there flows a collateral, but still important problem, namely: the dichotomy between what the Court aims to achieve and what its capabilities will permit it to achieve. All institutions need the confidence of the community if they are to survive as effective entities. If the tendency is to describe the Court in relation to its aim without regard to its capability, then its public image will suffer. The theoretical aims of the Court are as yet beyond attainment, but if these become fixed in the public mind as being, not only the aims of the Court, but what it does in fact achieve, there is the possibility of a reaction that could jeopardise the future of the Court in its present form. Hostility engendered by an adverse public opinion may be greater than the legitimate achievements of the Court can withstand. In the ultimate, it is better that the reality be recognised so that progress is made upon firm principle and not unfulfilled expectation.

Not only is it imperative that the community should not be permitted to have unrealistic impressions of the Court's function neither should the officials who administer the system and who have control of the programmes. Lack of understanding in that sphere could only cloud judgment and bring the overall system into disrepute as well as causing harm and injustice in individual cases. With the wide and virtually unfettered discretion conferred on officers by the legislation, sound and objective judgment becomes imperative. In the exercise of powers under the legislation, the larger goal should not become all pervasive so as to obscure that which is more mundane. There will, on occasions, be cases for which the facilities are not designed or where the course that should be followed is unknown. When such cases arise, the overall aim should not obliterate the reality: that some children present problems which the present facilities cannot solve. In such cases, a more humble objective should perhaps be pursued. Reality must ultimately be recognised. Probably the best progress will be achieved gradually, through the accomplishment of a number of small advances. Grandeur of the final aim should not supplant a recognition of the value of small, but nevertheless, concrete achievements.

Of great significance in this context, is the relationship of the Court with the other agencies in the community which also have a responsibility in regard to delinquency. The role of the court needs to be clearly appreciated. Any scheme for the control of delinquency will involve a far more widely based approach than the Court alone can provide. People are concerned, however, and it is their rights and persons that will be the subject of any scheme. Whilst the role of the Court may be only one of many functions being carried out by other agencies, it nonetheless is of importance. What is essential is that the respective roles of each agency be fully appreciated so that proper co-ordination is possible. On the one hand, the

Court needs to be fully aware of the social facilities available for the execution of any order it may make; and the necessary corollary that the agencies responsible for the programme should be aware of the role of the Court. Not only is that co-ordination necessary in the long-term, it is also vital for the efficient operation of the Children's Court in present conditions. No useful purpose is to be served by the imposition of orders by the Court that the executive agencies have neither the professional and technical expertise nor the facilities to carry into effect. There seems little doubt that the Court has a role to play, but the overall role needs to be carefully delineated. It follows that the Bench should be sufficiently well versed in the social aspects of the Court's work, as distinct from its purely judicial role, so that the wider nature of its role is fully understood. In other words, the Court should be capable of co-ordinating and should not see itself as so omnipotent that everything must be subservient to it. On the other hand, neither should the Bench be completely in the hands of so-called experts in sentencing, which is still part of the judicial power. For both reasons, the Bench needs a full appreciation of the wider implications of the jurisdiction.

## 2. The Grounds of Intervention:

As with any process whereby the personal liberty of an individual is to be circumscribed, the grounds for the circumscription should be clearly defined. If the intervention is, as the Children's Court philosophy requires, to be for the benefit of a child then that benefit should be clearly defined. Objective tests should be used, mere value judgments, the simple substitution of an official's opinion, is not to be compared with objective assessment of where the best interests of a child lie.

Insofar as delinquency is concerned, the ground that founds the jurisdiction of the Court is an affirmative finding on the issue of guilt. Here, the offence must be an ordinary offence, as created by the general criminal law. The criminal law applies quite generally and there are no special offences that bring children specially within the jurisdiction of the Court. A child cannot, unless he is guilty, be made the subject of a programme simply because an official of the executive agency, i.e. the child welfare services, is of the opinion that he would be better managed in some other way. Mere matters of opinion have no place. Where, however, the case is one of neglect the situation is not so clear.

Again, of course, the legal grounds for the intervention of the Court are defined by statute. Section 31 of the Child Welfare Act 1960 (Tas.) provides a definition of a neglected child. The point to note about it though is that it is in remarkably wide terms. For example, s. 31 (1)(a) reads as follows :-

"For the purposes of this Act, a neglected child means a child -

- (a) who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship and not exercising proper care and guardianship, is in need of care and protection, in order to secure that he is properly cared for and that he is prevented from falling into bad associations and from being exposed to moral danger."

Section 31 (a)(b) provides another example of a wide definition in defining as neglected -

"(a child) who is beyond the control of the parents or guardians with whom he is living".

The first definition is so wide that there is room for the assertion that a child who could be better cared for in an institution than with parents could be said to be neglected. There are no specific legislative criteria for the determination of what constitutes "proper care and guardianship".

The courts therefore are left to decide what the expression means. There is, thus, the possibility that it may be given a meaning that would encompass any type of child care that happened to be contrary to the notions of those who are responsible for the filing of complaints and conducting prosecutions. No one suggests that the power thus conferred is deliberately exercised capriciously but, under the legislative scheme the way is open for a prosecution to be launched where the standards of parents happen to be different from what the prosecuting authorities think they should be. One standard of normality is simply substituted for another. Nowhere can the Court obtain any legal guidance as to what constitutes neglect.

There is little wonder that in the absence of statutory guidance the Court may rely heavily upon the opinion of the child welfare authorities as the prosecutors, and who also provide the background social information for the disposition of the case. Here the danger is that matters of morality may become confused with, and be treated as, matters of law. Of course there are some parents against whom children need protection. Where the child is the object of drunken outbursts by a parent, for example or where the physical standard of the home constitutes a threat to health then there is no doubt that intervention is both justified and necessary. It is submitted that intervention should be possible only in those circumstances which are clearly defined and which command the support of the community. Objective definition should serve to prevent intervention on the ground that another method of child care is better than that provided by the parents, where standards are only matters of opinion.

When it is realised that children who come into contact with the Court and the welfare services run the risk of being categorised, this point assumes some importance. Not only in neglect and uncontrollability cases, but also in cases of ordinary delinquency. Whether or not the court proceeds



to a formal disposition, it is easy for a child who has been the subject of informal supervision, for whatever reason, to be labelled as delinquent or defiant. If he thinks of himself as such, his behaviour may correspond. Because of the limitations on information mentioned earlier, intervention should be limited to the clearest cases. This principle is reinforced by two factors: first, it is not clear that intervention of some sort is better than doing nothing. It has, in fact, been said that intervention may actually do harm as well as help or, at least, there may be the possibility that harm may be caused. If that is so, there should be strong reasons for intervention in the life of a child or of a family. Justification for intervention has been that early intervention is necessary if the child is to gain the full benefits from the welfare and rehabilitative techniques that the child welfare services provide. Such may be the case, but it is important not to over-estimate the effectiveness of present techniques. The second factor is that of over-professionalism. As social administrators become more professional and sophisticated in outlook, there is a greater possibility that a wider range of conduct may be regarded as abnormal, or perhaps more correctly, as in need of the services that a professional agency can provide. With greater sophistication in the services, the greater the tendency on the part of officials to see the need for intervention. Elaborate police schemes for the control and prevention of delinquency prior to Court proceedings have been said to result in a higher proportion of juveniles finally being prosecuted. The same has been said of judges who are therapeutically inclined and have been more willing to commit children to residential care than judges who are more traditional in their approach. This is one of the problems that a properly qualified children's court magistrate should be trained to recognise.<sup>3</sup>

It is beyond the scope of this thesis to attempt an assessment of the validity of the techniques used for the control and prevention of delinquency or to adjudicate upon whether, in particular cases, the present techniques are successful. However, the limitations of present social knowledge are highly relevant in examining the role of the Court and the scope of the legislation under which it is created. For it is important that powers and discretions should not be placed in the hands of agencies which lack the professional skill for their proper exercise. One must again hasten to add that that is not intended as a particular criticism levelled at the present services or that the services are unskilled and inefficient. A judgment on that is outside the scope of the present work. Rather it is a general comment upon a legislative scheme. Wide powers and discretions are conferred upon the welfare services which, as a group, lack professional techniques and technical knowledge to justify the confidence that is reposed in them by the legislature. So it follows that intervention in the lives of children and families should be permitted only under precisely specified conditions.

By far the fairest policy, it would seem, is that children should not be enmeshed in the welfare services unless it is required for the protection of the community. The role of the Court would be to determine when that need arose. In legal terms it means that the grounds upon which the Court is empowered to make an order should be clearly defined by the statute. Insofar as the delinquent child is concerned, the test is whether he is guilty of an offence known to the ordinary criminal law. Definition becomes more difficult for the neglected child. But here again such vague generalizations as "not exercising proper care and guardianship" and "beyond the control of the parents or guardians with whom he is living" could be made more precise. If the child fell within the definition, then the role of the Court would be to

make a finding on that question of fact. Only after the preliminary question is answered in the affirmative would the further step, i.e. the disposition of the case, become relevant. There should be no confusion of the two issues. If the definition is wide and general a child may be said to be neglected just because if he were subject to a welfare programme he might be better cared for. This argument is a confusion of the two steps in the process and it is submitted that these steps must be kept separate and distinct. Even children have rights before the law which should not be denied them. If children were sentenced without proper trials and subjected to programmes and treatment the procedure would be called tyranny. It is no loss that because the confusion of the two issues is well motivated, indeed that may render it even more dangerous. There will then be no conscience to check excesses.

Juvenile aid panels represent the rehabilitation philosophy in its most highly developed state. Accepting the fundamental basis of the Children's Court theory, that the only aim of the jurisdiction is to rehabilitate children and act as the guardian of their welfare, it becomes irrelevant whether the child has committed an offence or not. If it is treatment that he needs, then the child will still need it whether he has offended or not. For the panels, treatment is the only consideration. In South Australia the Juvenile Courts Act requires that the child shall have committed an offence before intervention is permitted. That is beyond doubt; it is also beyond doubt that this aspect of the proceeding may be pushed into an insignificant corner in the background. There is no legal eye to see whether a plea of not guilty should have been more appropriate, and in some cases to direct a plea of not guilty. The only requirement is that the child make a confession to the panel, a far cry from a judicial proceeding in a Court of law. The benevolence and good will of the panel is to replace the impartial finding of the Bench. Upon the child agreeing that he is guilty, the panel will then proceed to suggest that

he should participate in a programme, if it is their opinion that it is necessary. The concept of guilt is not completely eradicated from the panel system, but it is clearly intended to be an unimportant and subsidiary part of the overall process. Yet the power conferred upon panels is in every way as extensive and imperative as that conferred on a Court with machinery for enforcement no less efficient. Throughout the whole of the panel concept, the emphasis is upon rehabilitation and welfare. If a child is in need of treatment, what does it matter that he may not have committed an offence at all? One might almost say that the fortunate children are those who offend. They come under the official attention of the panel and given the treatment they are said to need. Those who do not offend probably will not come under the notice of the helping benevolence of the panel and will run the risk of not having the treatment. But, if it was lack of information that finally sounded the warning for the welfare type legislation in the United States, the same warning should be heeded before the instigation of legislation that reduces the Court to the status of a policeman enforcing the observance of what is in reality an administrative decision made on the discretion of a body that is not answerable to the Court in any meaningful way.

Neither the Juvenile Courts Act of South Australia nor the proposals of the Kilbrandon Committee, upon which it is based, replace the Court. To the Court the proceedings may be transferred at any time upon request from the defendant or parents. Just how realistic that right is remains to be seen. Some indication may though be gained from the reasoning of the Committee that some 98% of children entered pleas of guilty in any event. That being so, one may speculate that the proportion of children seeking resort to the Court instead of to the panel will be small indeed, probably negligible. The only criteria upon which the panel proceeds is the best interest of the child, or what the panel considers to be his best interest and the latter is primarily the ground upon which a panel will decide to intervene.

When a child comes before a panel, providing he makes the necessary confession, no further consideration need be given to the facts constituting the grounds for referral. The sole consideration becomes what should be done in the way of treatment and training. That he may only have ridden a bicycle without a tail light is of no consequence if the view is that he should be committed to care. It is of no concern that conduct which would result in a small fine, or even dismissal without conviction for an adult in the case of a child, may bring a programme both in care and out of it, lasting ten years or more. There is, of course, no concrete evidence but one may surmise that a Court, confronted with a young child who had committed a minor wrong, would hesitate long before imposing what could amount to an indeterminate sentence. The same point may be made here as above, that before such an abrogation of legal right is permitted, there should be conclusive evidence of the effectiveness of the techniques with which that right is supplanted. To attempt a final assessment of the panel as a social concept is beyond the scope of the present work which attempts only to comment upon the status of legal rights under the legislation and the legal operation and responsibility of the new machinery.

Before leaving the panel concept, it may be noted that the processes of the panel, despite the euphemistic wording of the legislation, are in no sense voluntary. Here at least the legislature has found a role for the Court. Any child or parent who does not "voluntarily" agree with the panel that a programme is necessary, may be referred to the Court. The Court simply gives the directions of the panel the force of law. To be fair of course it must be added that the former does have an important appellate jurisdiction. When a child is in care the Court may hear an appeal against the programme at any time, so long as the intervals between appeals are not less than twelve months. This is a new and valuable right and its development should be watched with interest.

### 3. Sentencing Practice.

It is appropriate to add a short note about the actual sentencing practice of the Court. To isolate and evaluate each factor that is relevant in determining sentence and whether the background reports have any influence upon the decision, is a statistical exercise outside the scope of this study.<sup>4</sup> But from a legislative point of view, great disparity may exist. A minor offender may be sent to an institution and be required to undergo treatment lasting perhaps for years. Conversely, a child found guilty of a serious offence may be simply admonished and discharged or placed under a supervision order. Indeed, argue those in favour of the system, that is so and it is essential that it should be for, then, how else could the objective of personalised justice be attained. On the other side it may be contended by the critics that the disparity in sentencing is a grave weakness. There should be some relationship between the order and the seriousness of the offence. However, there are no norms to which the Court may have regard in sentencing. As a result, it is possible for a wide variation in sentencing practice, not only as between the Children's Court and the adult tribunals, but also within the Children's Court itself. The fate of a child could depend heavily upon the Magistrate before whom he chanced to appear.

The difficulty is to achieve a balance between the flexibility necessary to the ends of personalized justice and some conformity to overall patterns to keep perspective between the offence and the final order. It may be possible for broad guide-lines to be formulated, perhaps by legislation or by rules of Court. Also, though, it points to the need for Magistrates who are especially qualified for such a specialized jurisdiction. Not only is a sound familiarity with the law and criminal procedure called for, but also a good working knowledge of the social sciences that form the background to the jurisdiction. As it is, the latter overshadows the former. The Court must

be in a position to evaluate the assistance provided by the expert rehabilitation workers. For that reason, the task of a Children's Court Magistrate is a highly complex one, calling as it does, for an exercise of skill and judgment beyond that of a judicial finding upon a question of fact.

Unfortunately, the Children's Court Magistrate has no tangible and readily available guide to help him in his task.

NOTES

1. The Presidents Commission on Law Enforcement and Administration of Justice - Task Force Report  
Juvenile Delinquency and Youth Crime p. 8.
2. S 19 (5) and (7)
3. For a good general discussion of this problem see  
Wheeler & Cotterell: Juvenile Delinquency: Its  
Prevention and Control P.22-35 (1966)
4. See, for a study in Sydney Some Factors Related to  
orders made by Childrens Courts by J. Kraus in The  
Australian Criminal Justice System: Chappell &  
Wilson (eds) 1972.  
For an English study see Ford: Advising Sentencers  
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